DEFENDING MARRIAGE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

APRIL 15, 2011

Serial No. 112–36

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APRIL 15, 2011

DEFENDING MARRIAGE

FRIDAY, APRIL 15, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:05 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Smith, Nadler, Quigley, Conyers and Scott.

Staff Present: (Majority) Holt Lackey, Counsel; Sarah Vance, Clerk; (Minority) Heather Sawyer, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Good morning, and welcome to this hearing of the Constitution Subcommittee. The title of today's hearing is Defending Marriage. The reason that we are here is that the Obama administration recently announced that it would no longer defend marriage.

Specifically, on February 23, 2011, the Attorney General sent a letter to congressional leaders explaining that the President had concluded that the Defense of Marriage Act's definition of marriage as meaning, "only a legal union between one man and one woman as husband and wife," violated the Constitution. Accordingly, the President and Attorney General are no longer defending that law in court.

For decades, Administrations of both parties have followed a policy of defending every Federal law for which a reasonable argument can be made. This policy of defending laws respects Congress' role as the makers of the law and the courts' special role in addressing the constitutionality of Federal laws.

When the President unilaterally declares a duly enacted law unconstitutional, he cuts Congress and the American people out of the lawmaking process, and such heavy-handed Presidential actions undermine the separation of powers and the principle that America is a constitutional Republic predicated on the rule of law. This is why legal scholars of both parties agree that Presidents should presume that statutes are constitutional and give great deference and consideration to the views of the Congress that enacted the law in the first place.

As liberal constitutional scholar and then head of the Office of Legal Counsel, Walter Dellinger advised President Clinton, "A President should proceed with caution and with respect for the ob-

ligation that each of the branches shares for the maintenance of constitutional government."

President Obama's edict that the Defense of Marriage Act is unconstitutional fails to show the caution and respect for Congress and the courts that Professor Dellinger counseled. Far from cautious and deferential, the President's decision was a badly opportunistic attempt to free himself from a political dilemma. The President and the Administration had a duty to defend the Defense of Marriage Act, but powerful constituencies of the President did not want the President to defend it, and, unfortunately, politics trumped duty.

Now, it is true that past Presidents have declined to defend certain statutes that they in good faith determined were unconstitutional, but never has a President refused to defend a law of such public importance on a legal theory so far beyond any court precedent—and so clearly and transparently for political reasons. The President's decision to ignore his duty threatens both the structure of our Republic and the time-tested structure of family itself.

The arguments in favor of the Defense of Marriage Act are reasonable and right, and they have repeatedly prevailed in court: Children need a mother and father committed to staying together as a family. With all of its challenges (and they are many) and the attacks brought against it, traditional marriage has proven to be the most successful institution in humanity's history for the propagation and preparation of the next generation. The traditional family has proven to be the best Department of Welfare, the best Department of Drug Prevention, the best Department of Education, the best Department of Crime Prevention, and the best Department of Economic Security that there has ever been.

By any accurate measure, traditional marriage gives children the very best chance of being raised in the most stable and loving family environment possible. By any measure, children raised in families with a married mother and father on average are healthier and happier than children raised in less ideal circumstances. For centuries governments have passed and maintained marriage laws to protect this vital societal interest.

Marriage is more than just an agreement by, between and for two adults. Marriage is a promise that two adults make to their fellow human beings to form a family committed to the well-being of any children that may come from their union. It is an institution that has formed a primary building block of successful societies and nations for thousands of years, and to casually discard it places our children and future generations at risk.

I am encouraged that the House is now intervening to fill the void left by the Administration's abdication of its duty to defend the laws of the land. Marriage deserves to be defended, and today's hearing is an important step in that defense. I look forward to hearing from our witnesses.

[The prepared statement of Mr. Franks follows:]

Mr. Frank's Opening Statement
Subcommittee on the Constitution
Hearing on: "Defending Marriage"
Friday, April 15, 2011 at 10:00 a.m. in Room 2141 Rayburn HOB

Good afternoon, and welcome to this hearing of the Constitution Subcommittee. The title of today's hearing is "Defending Marriage." The reason we are here is that the Obama Administration recently announced that it would no longer defend marriage.

Specifically, on February 23, 2011, the Attorney General sent a letter to Congressional leaders explaining that the President had concluded that the Defense of Marriage Act's definition of marriage as meaning "only a legal union between one man and one woman as husband and wife" violated the constitution. Accordingly, the President and Attorney General are no longer defending that law in court.

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This is why legal scholars of both parties agree that Presidents should presume that statutes are constitutional, and give great deference and consideration to the views of the Congress that enacted the law.

As liberal constitutional scholar and then-head of the Office of Legal Counsel Walter Dellinger advised President Clinton, "a President should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government."

President Obama's edict that DOMA is unconstitutional failed to show the caution and respect for Congress and the courts that Professor Dellinger counseled.

Far from cautious and deferential, the President's decision was a baldly opportunistic attempt to free himself from a political dilemma. The Administration had a duty to defend DOMA, but powerful constituencies of the President did not want the President to defend it. Politics trumped duty.

It is true that past Presidents have declined to defend certain statutes that they, in good faith, determined were unconstitutional. But never has a President refused to defend a law of such public importance, on a legal theory so far beyond any court precedent, for such transparently political reasons.

The President's decision to ignore his duty threatens both the structure of our republic, and the time-tested structure of our families.

The arguments in favor of the Defense of Marriage Act are not just reasonable. The arguments in favor of the Defense of Marriage Act are reasonable and right, and they have repeatedly prevailed in court.

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I am encouraged that the House is now intervening to fill the void left by the Administration's abdication of its duty to defend the laws of the land. Marriage deserves to be defended. Today's hearing is an important step in that defense.

Mr. FRANKS. I now recognize the Ranking Member of the Subcommittee Mr. Nadler for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Today's hearing is entitled Defending Marriage. And my colleagues in the majority undoubtedly will criticize the Obama administration for deciding that section 3 of the 1996 Defense of Marriage Act, or DOMA, is unconstitutional and cannot be defended in certain court cases.

The argument that the Administration has somehow acted inappropriately is a red herring, an effort by DOMA supporters to distract from the real question here, which is whether anyone should be defending this abhorrent and immoral law. The Administration has decided that, at least in certain cases, it should not. The Attorney General followed the procedure that Congress established, codified at 28 U.S.C. Section 530(d), for exactly this situation. And there are numerous notable examples of prior Administrations that, having determined that a law is unconstitutional, have either refused to defend it or affirmatively attacked it in court.

In the 1990 case of *Metro Broadcasting v. FCC*, for example, then-Acting Solicitor General John Roberts in the Bush administration, now Chief Justice of the United States, argued that a statute providing for minority preferences in broadcast licensing was unconstitutional. Despite Supreme Court precedent applying a more permissive standard of review, he argued that strict scrutiny applied. Senate legal counsel appeared as amicus in the case defending the law, which was upheld.

Clearly, there were reasonable arguments that could have been made in defense of the law. Should we now excoriate Chief Justice Roberts' efforts as purely political and worthy of punishment? His view was not vindicated in that case by the Court, but may ultimately have resulted in a shift of the law, which makes it additionally clear that what the President has done here is neither unprecedented nor inappropriate.

What we should be exploring in this hearing, and before the House of Representatives engages in time-consuming and costly litigation, is how anyone can justify prolonging the life of this harmful and immoral law. Speaker Boehner has announced his intent to do so. And before the House charges to DOMA's defense, we should understand the arguments the Speaker believes support his cause and why he disagrees with the decision of the President, the Attorney General, and Federal Judges Joseph Tauro and Stephen Reinhardt, who have considered the question carefully and with the benefit of extensive legal and factual briefings.

On April 4, several of us wrote to Speaker Boehner asking for a briefing regarding his planned defense of section 3 of DOMA. I now ask the Chair of the Subcommittee and full Committee, the gentleman from Arizona and the gentleman from Texas, to ask the Speaker to address the Committee and answer questions Members on both sides of this question may have.

In ruling that section 3 of DOMA cannot survive even rational basis review, the most permissive review, Judge Tauro pointed out that in 1996, when this Committee and the Congress considered DOMA, we did not bother to obtain testimony from historians, economists, or specialists in family or child welfare who might have informed our decision regarding the Federal interests at stake and how DOMA would affect Federal programs. Now, however, the executive branch and the courts have done that job for us. At a minimum, we should consider their factual findings carefully before we insist that this law is worthy of the time and expense of the House defense.

In ruling that section 3 is unconstitutional, Judge Tauro considered and rejected the justifications that Congress gave when it

passed DOMA as well as any post hoc rationalizations given to support the law. For example, he rejected the argument that section 3 of DOMA is justified by an alleged interest in encouraging responsible procreation, finding that there is no credible support for the notion that gay and lesbian parents are not as capable as their heterosexual counterparts, and that excluding the gay and lesbian families from the Federal protections of marriage does nothing to promote the stability of heterosexual parents and marriages.

Equally important for the purposes of DOMA, Judge Tauro found that this type of interest is properly a State, not a Federal, concern. The Federal Government has historically had no role in setting the rules for marriage or, for that matter, for divorce; and, therefore, the Federal Government has no equivalent interest in regulating the underlying criteria for marriage.

My colleagues who have claimed to be staunch defenders of states' rights should be alarmed by DOMA's unprecedented meddling in the States' affairs of marriage. DOMA denies certain legally married couples, legally married under the laws of their States, denies to them access to Federal laws that factor in marital status, including Social Security and health care programs, which secure citizens' health and well-being. The exclusion of any married couples from these programs would defy logic. That section 3 carves out an entire class of married citizens based on sexual orientation also violates constitutional equal protection guarantees.

Even under rational basis review, the law cannot survive. It certainly cannot survive more searching review, which the Attorney General and the President have concluded is the appropriate level of scrutiny for laws that discriminate against gay men and lesbians.

Facing lawsuits in a jurisdiction with no statements on the question of the appropriate standard of review, Attorney General Holder applied the factors that the Supreme Court has considered when determining whether heightened review is warranted, and concluded that the criteria had been met. While critics may disagree with his conclusion, it cannot credibly be argued that either he or the President have done anything remotely unprecedented and nothing that warrants or calls for impeachment or reduced funding for the Department of Justice. Nor can anyone who has looked at DOMA's legislative history credibly claim that this law should enjoy the same presumption of validity as most acts of Congress.

The Congressional Record makes perfectly clear that DOMA is intended to express moral disapproval of gay men, lesbians, and their families. Representative Henry Hyde, then-Chairman of this Committee, for example, declared that "most people do not approve of homosexual conduct, and they express their disapprobation through the law."

During floor debate, Members repeatedly voiced disapproval of homosexuality as immoral or depraved, and argued that allowing gay and lesbian couples to marry would demean and trivialize heterosexual marriage and might prove to be the "final below to the American family."

This evidence of the intent of the law, being to discriminate against a specific group of people based on prejudice against them, or disapproval of that group based on pure animus, is presumptive

evidence of denial of equal protection and of the need for heightened scrutiny. The Administration so concluded, and that conclusion compelled the determination that the law could never survive heightened scrutiny and, therefore, could not be defended as to its constitutionality.

In 1996, of course, gay and lesbian couples could not marry anywhere in the world. Now they can marry in five States and the District of Columbia, couples like Jen and Dawn BarbouRoske, who have been together for more than 20 years. In July they will celebrate their second wedding anniversary as a legally married couple in their home State of Iowa. They are raising two wonderful daughters, McKinley and Brianna, who are with their parents here today.

Or Edie Windsor and Thea Spire, who began dating in 1965, got engaged in 1967, and finally married in 2007. Thea passed away 2 years later after the couple had loved, lived with, and care for each other for more than four decades, and after, as Edie, who is a constituent of mine, put it, sharing all the joys and sorrows that came their way.

Far from demeaning, trivializing, or destroying the institution of marriage, these couples have embraced this time-honored tradition and the commitment and serious legal duties of marriage.

Rather than defending DOMA in court, Congress should be working to repeal it. There is no redeeming moral value to a law whose sole goal and sole effect is to persecute a group of people for no reason and no benefit to anyone else.

With that, I yield back the balance of my time.

Mr. FRANKS. Thank you, Mr. Nadler.

[The prepared statement of Mr. Nadler follows:]

Opening Statement of Rep. Jerrold Nadler

Hearing on "Defending Marriage"

Constitution Subcommittee, House Judiciary Committee
April 14, 2011, 10 a.m.
Room 2141 of the Rayburn House Office Building

Today's hearing is titled "defending marriage," and my colleagues in the Majority undoubtedly will criticize the Obama Administration for deciding that Section 3 of the 1996 "Defense of Marriage Act" (DOMA) is unconstitutional and cannot be defended in certain court cases.

The argument that this Administration has somehow acted inappropriately is a red herring: an effort by DOMA's supporters to distract from the real question here, which is whether anyone should be defending this law.

This Administration has decided that, at least in certain cases, it should not. The Attorney General followed the procedure that we have established, codified in 28 USC Section 530D, for exactly this situation and there are numerous notable examples of prior administrations that, having determined that a law is unconstitutional, have either refused to defend it or affirmatively attacked it in court.

In the 1990 case of Metro Broadcasting v. FCC, for example, then Acting Solicitor General John Roberts, now Chief Justice of the United States, argued that a statute providing for minority preferences in broadcast licensing was unconstitutional. Despite Supreme Court precedent applying a more permissive standard of review, he argued that strict scrutiny applied.

Senate Legal Counsel appeared as amicus in the case, defending the law, which was upheld.

Clearly there were reasonable arguments that could have been made in defense of the law. Should we excoriate Chief Justice Roberts' efforts as purely political, and worthy of punishment? His view was not vindicated in that case, but may ultimately have resulted in a shift in the law, which makes it additionally clear that what the President has done here is neither unprecedented nor inappropriate.

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Speaker Boehner has announced his intent to do so, and before the House charges to DOMA's defense, we should understand what arguments the Speaker believes support his cause, and why he disagrees with the decision of the President, Attorney General, and federal judges Joseph L. Tauro and Stephen Reinhard who have considered the question carefully, and with the benefit of extensive legal and factual briefings.

On April 4th, several of us wrote Speaker Boehner asking for a briefing regarding his planned defense of Section 3. I now ask the Chair of the Subcommittee and full Committee, the Gentlemen from Arizona and Texas, to ask the Speaker to address the Committee and answer questions members on both sides of this question have.

In ruling that Section 3 of DOMA cannot survive even rational basis review, Judge Tauro pointed out that – in 1996 when this Committee and the Congress considered DOMA – we did not bother to obtain testimony from

historians, economists, or specialists in family or child welfare who might have informed our decision regarding the federal interests at stake and how DOMA would affect federal programs.

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DOMA denies only certain legally married couples access to federal laws that factor in marital status, including Social Security and healthcare programs, which secure citizen's health and well-being. The exclusion of *any* married couples from these programs defies logic; that Section 3 carves

out an entire class of married citizens based on sexual orientation also violates constitutional equal protection guarantees.

Even under rational basis review, the law cannot survive. It certainly cannot survive more searching review, which the Attorney General and President have concluded is the appropriate level of scrutiny for laws that discriminate against gay men and lesbians.

Facing lawsuits in a jurisdiction with no statements on that question, Attorney General Holder applied the factors that the Supreme Court has considered when determining whether heightened review is warranted, and concluded that the criteria had been met. While critics may disagree with his conclusion, it cannot credibly be argued that either he, or the President, have done anything remotely unprecedented and nothing that warrants calls for impeachment or reduced funding for the Department of Justice.

Nor can anyone who has looked at DOMA's legislative history credibly claim that this law should enjoy the same presumption of validity as most Acts of Congress. The congressional record makes perfectly clear that DOMA is intended to express moral disapproval of gay men, lesbians, and their families. Representative Henry Hyde, then-Chairman of this Committee, declared that "most people do not approve of homosexual conduct . . . and they express their disapprobation through the law." During floor debate, members repeatedly voiced disapproval of homosexuality as "immoral" or "depraved" and argued that allowing gay and lesbian couples to marry would demean and trivialize heterosexual marriage and might prove to the "the final blow to the American family."

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Far from demeaning, trivializing, or destroying the institution of marriage, these couples have embraced this time-honored tradition and the commitment and serious legal duties of marriage. Rather than defending DOMA in court, Congress should be working to repeal it.

With that, I yield back the balance of my time.

Mr. FRANKS. Now I would yield to the distinguished former Chairman Mr. Conyers for 5 minutes for an opening statement.

Mr. CONYERS. Thank you, Chairman Franks. I ask unanimous consent to put my statement into the record.

Mr. FRANKS. Without objection.
[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr.
for hearing on "Defending Marriage" before the
Subcommittee on Constitution, House Judiciary Committee

Friday, April 15, 2011, at 10:00 a.m.
2141 Rayburn House Office Building

Today the Subcommittee considers the Obama Administration's determination that Section 3 of the "Defense of Marriage Act" (DOMA) is unconstitutional and cannot be defended in certain court cases.

Some of my colleagues in the Majority have called for defunding of the Justice Department because of this decision. Yet they did not invite the Administration to participate here today, apparently deciding that it might be better to condemn them in absentia.

It is particularly ironic that my colleagues are protesting so loudly now when they said not a word when President George W. Bush declared laws unconstitutional and claimed the right – in no fewer than 750 signing statements – to refuse to enforce portions of law he might later deem objectionable without further notice to Congress.

Those statements, we later learned, were invoked by the prior Administration to bypass the Congressional ban on torture in the McCain Amendment, and oversight provisions in the Patriot Act, among others.

Certainly those who did not object to the secretive overruling by the executive branch of Acts of Congress should hardly have standing to complain when President Obama invokes the very procedure created by Congress to notify us of his determination that a law is unconstitutional, and that – while he will continue to enforce that law – the Justice Department will no longer defend it in certain court cases.

There also are notable examples from prior administrations where, like here, a determination has been made that a law is unconstitutional and cannot be defended in court. Indeed, our sitting Chief Justice John Roberts, in the 1990 case of *Metro Broadcasting v. FCC*, argued that a statute granting minority preferences

in broadcasting licenses was unconstitutional, arguing for strict scrutiny even though the Court previously had applied a more permissive standard.

President George H.W. Bush's Administration refused to defend "must carry" provisions in the Cable Television Act in a case brought by Turner Broadcasting against the Federal Communications Commission. That litigation was still pending when his predecessor took office and the Clinton Administration reconsidered President Bush's position, decided the law was constitutional, and successfully defended it in court.

Given that there were reasonable arguments available in defense of the law's constitutionality in both of these cases, should we now condemn the first Bush Administration and Chief Justice John Roberts for playing politics with the law?

Notably, their determinations were not vindicated by the courts in these cases. What possible justification might we have, then, to punish this Administration for determining its position on the law, whether or not that view ultimately prevails in the courts at this time?

Attorney General Holder has notified the Congress and the courts, invoking the procedure that Congress has established and is now codified at 28 U.S.C. § 530D. While no Administration should cavalierly disregard the laws that we enact, that is not what is happening here. Contrary to the claims of its critics, the Administration is still enforcing this law and even has indicated that it will continue to defend the law where a court determines rational basis review applies.

On this front, I disagree with the Administration. Now that the President has determined that the law unconstitutional, his Justice Department should defend that position to the courts, and work vigorously to ensure DOMA's defeat.

The President has long called for the repeal of DOMA, making clear he disagrees with the law as a matter of policy. He has now also concluded that Section 3 of the law, which defined marriage for purposes of all federal laws as "between one man and woman as husband and wife" also cannot stand as a matter of law. Section 3 is not about who has the right to marry; the states decide that. Section 3 is about how couples who already are married under state law will be treated under federal law.

By virtue of Section 3, gay and lesbian couples already married under state law are denied recognition as a family under no fewer than 1,138 federal laws that take marital status into account. Among those laws are Social Security, which provides survivor benefits, and into which every working American – including lesbian and gay couples – must pay. What is the possible federal interest in denying gay and lesbian citizens, who are already married under state law, the security that spousal survival benefits might bring?

In considering the claims of gay and lesbian couples in *Gill v. OPM*, where the Justice Department has been defending DOMA, federal District Court Judge Joseph L. Tauro concluded that no such interest exists:

> "This court is soundly convinced . . . that the government's proferred rationales, past and current, are without footing in the realities of the subject addressed by [DOMA]. And when the proferred rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest, this court finds that DOMA lack a rational basis to support it."

Judge Reinhard of the Ninth Circuit Court of Appeals also found that Section 3 cannot survive even rational basis review. In reaching this conclusion in a case brought by a federal public defender seeking to add his same-sex spouse to his health insurance policy (*In re Matter of Brad Levenson*), Judge Reinhard took the position that it was likely that "some form of heightened scrutiny applies." Because the law could not even survive rational basis review, he determined that it was not necessary to reach that question.

That question was recently put squarely before the Attorney General and President in two new cases challenging Section 3 of DOMA filed in the Second Circuit Court of Appeals, a jurisdiction with no statement on the standard of review for laws, like DOMA, that discriminate based on sexual orientation.

In consultation with his Attorney General, the President decided that laws that single out gay men and lesbians for particular harm should not be presumed

valid and, instead, require more searching review. This conclusion should come as no surprise given the history of discrimination against gay men and lesbians, including laws that have branded them criminals and barred them from serving in our military, and the fact that one's sexual orientation bears no relation to the ability to participate or contribute to society.

It also is unsurprising given the record of animus that generally accompanies laws that target gay men and lesbians, including the congressional record for DOMA.

As the Supreme Court declared in *Romer v. Evans*, the bare desire to harm or to express moral disapproval of a particular group is not a legitimate justification for a law, even under rational basis review. I was here for our debate over DOMA, which I argued and voted against. That debate was ugly and often descended into the kind of animus that alone makes the case against DOMA.

With that, I yield back the balance of my time.

Mr. CONYERS. Thank you, sir.

The thing that bothers me at this hearing of the Subcommittee is that the Department of Justice is not present, and I am informed that they were not invited. And could I ask the Chairman why that is? We have one of the leaders in the country, Ms. Gallagher, who

has raised hundreds of thousands of dollars against judges who have opposed her position, as the lead witness, but there is nobody here from the Department of Justice. And I would yield to my friend.

Mr. FRANKS. Mr. Conyers, I understand that there is going to be an oversight hearing in May where the Department of Justice would be invited to come.

Mr. CONYERS. Well, then why are we starting—if the Department of Justice is coming, what are we doing here with this wonderful panel of friendly people, of course? But why do we start off with the chairmen of organizations that are—and she has written books against this position. We have another hostile witness to this. And you tell me that next month we will be getting the Department of Justice to find out where they stand.

Mr. FRANKS. Mr. Conyers, I would just suggest to you that the makeup of the witnesses here is no different than most other hearings like this. You have people on both sides of the issue that are known for their advocacy or dissent on a particular issue. We have the same makeup of the witnesses. Professor Ball will be a witness for your perspective. And let me just say to you we have tried to make it essentially the same as we have always done.

Mr. NADLER. Would the gentleman yield?

Mr. FRANKS. I would like to go ahead and ask you to finish your opening statement.

Mr. NADLER. Would the gentleman yield?

Mr. CONYERS. Yes.

Mr. NADLER. Thank you.

I would just point out that normally if the subject of a hearing is criticism of a decision of Department, you would invite the Department to be criticized and to answer for their position.

I yield back. I thank the gentleman for yielding.

Mr. CONYERS. I have got a statement to make, but it follows along very closely with Ranking Member Nadler's. But I am not pleased that we will finally, sometime in the future, hear from the Department of Justice that is being roundly criticized by you.

And I happen to be aware of some of your remarks earlier, Chairman Franks, about what ought to happen, and I think there is a political tone in this hearing that I want to try to diminish as much as possible as we begin this. And I want you to know that this follows much of the rhetoric that has come out of the Congress and in the public on this for many years, this antiactivity.

The first witness is probably the lead person in the country on this subject, and is certainly entitled to her opinions, and I can't wait to hear them. But the fact of the matter is that this is not the regular order, and I did not approve of the way that we are starting off this subject. And I happen to know of some of the personal animosity that exists in the Congress on this subject, and so it is not like we come here pretending that it doesn't exist. It does.

And so it is with that concern—and I am glad that you allowed me to make it, Chairman Franks—that I raise these questions of procedure. And I yield to the gentleman from Illinois Mr. Quigley.

Mr. QUIGLEY. Mr. Chairman, could I have 1 minute, please? I know he yielded. I am not sure he has any time.

Mr. FRANKS. We have our Chairman here, and I would yield to him here. And I would just briefly suggest to the former Chairman that there is no animosity in my heart toward anybody here whatsoever. I can't speak for others. But my concern is just as I stated in my opening statement.

And I will now recognize the distinguished Chairman of the full Committee Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Today's hearing concerns two issues critical to the future of our country. The first is the importance of protecting the institution of marriage.

For thousands of years, the union of a man and a woman has formed the cement of civilizations and provided the stability to societies in all parts of the world. It is time tested. Until the last decade, no society had ever made same-sex relationships equivalent to a marriage between a man and a woman. This is because marriage is the means by which societies encourage mothers and fathers to form stable families to raise children. But the trend over the past half century has been to neglect children's interests in stable families and think of marriage's only purpose as making adults happy. The movement for same-sex marriage is a part of this trend.

If we tamper with the definition of marriage, harmful unintended consequences could follow. The ability of religious institutions to define marriage for themselves and promote their sincerely held beliefs could be threatened. The role of marriage in society is too important to dilute the long-standing and widely accepting standard that it is a union between a man and a woman. We cannot know all of the consequences that might follow from such a radical experiment, but we do know that government cannot change the definition of marriage without changing its meaning.

The second issue raised by this hearing is also important: Who in our system of government has the power to decide fundamental questions like what marriage means; unelected judges, or the people?

The American people's preference for a traditional definition of marriage as one man and one woman cannot be seriously questioned. Forty-five States limit marriage to one man and one woman. Thirty States have amended their State constitutions in recent years to include the traditional definition of marriage in their fundamental law. In several States in which judges tried to impose gay marriage, the people have reasserted the traditional view of marriage. Hawaiian and Californian voters amended their constitutions to overrule activist decisions by their State supreme courts. Iowans opposed their supreme court's judicial activist creation of gay marriage by voting out every incumbent justice on the ballot in the 2010 elections.

The will of the American people is clear: They want their government to defend the traditional institution of marriage, and judges should respect the will of the people. No one can seriously believe that the Constitution's authors intended to create a right to same-sex marriage.

Unfortunately, the President appears to want courts rather than the democratic process to define marriage in America. By refusing

to defend the Defense of Marriage Act against legal challenges, the Administration has invited courts to overrule that popular law.

The President recognized the political reality that most American people disagree with him and claimed to support traditional marriage during his run for the White House. The Administration has still not directly advocated gay marriage. Instead, the Administration devised an indirect strategy to advance gay marriage without political accountability. By trying to lose in court, the Administration invited courts to do the controversial work of imposing gay marriage for them.

The Administration tried to lose in court first by refusing to argue that traditional marriage fosters responsible procreation, an argument for traditional marriage that has prevailed in court. The Administration's efforts to lose in court reached their peak with the February 23, 2011, announcement that the Administration would no longer defend DOMA.

The policy of defending Federal laws, which Attorney General Holder promised to follow at his confirmation hearing, protects our constitutional system. By abandoning this policy.

The Administration has reversed the normal roles of the three branches of government. It has shirked the executive branch's responsibility to enforce the law, undermined Congress' role in making law, and invited courts to make policies that should be made by the elected branches of government.

Thank you, Mr. Chairman, for holding this hearing, and I will yield back the balance of my time.

Mr. FRANKS. Well, thank you, Mr. Smith.

[The prepared statement of Mr. Smith follows:]

Mr. Smith's Opening Statement
Subcommittee on the Constitution
Hearing on: "Defending Marriage"
Friday, April 15, 2011 at 10:00 a.m. in Room 2141 Rayburn HOB

Today's hearing concerns two issues critical to the future of our Republic.

The first is the importance of protecting the institution of marriage. For thousands of years, the union of a man and a woman has formed the cement of civilizations and provided stability to societies in all parts of the world. It is time-tested. Until the last decade, no society had ever made same-sex relationships equivalent to a marriage between a man and a woman.

This is because marriage is the means by which societies encourage mothers and fathers to form stable families to raise children.

But the trend over the past half-century has been to neglect children's interest in stable families and think of marriage's only purpose as making adults happy. The movement for same-sex marriage is a part of this trend.

If we tamper with the definition of marriage, harmful unintended consequences could follow. The ability of religious institutions to define marriage for themselves and promote their sincerely held beliefs could be threatened.

The role of marriage in society is too important to dilute the long-standing and widely-accepted standard that it is a union between a man and a woman. We cannot know all of the consequences that might follow from such a radical experiment. But we do know that government cannot change the definition of marriage without changing its meaning.

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The will of the American people is clear. They want their government to defend the traditional institution of marriage. And judges should respect the will of the people. No one can seriously believe that the Constitution's authors intended to create a right to same-sex marriage.

Unfortunately, the President appears to want courts, rather than the democratic process, to define marriage in America. By refusing to defend the Defense of Marriage Act against legal challenges, the Administration has invited courts to overturn that popular law.

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The policy of defending federal laws, which Attorney General Holder promised to follow at his confirmation hearing, protects our constitutional system.

By abandoning this policy, the Administration has reversed the normal roles of the three branches of government. It has shirked the Executive branch's responsibility to enforce the law, undermined Congress's role in making law, and invited courts to make policies that should be made by the elected branches of government.

I am pleased that we are holding this public hearing to debate these issues openly in the halls of Congress. That is the way that decisions in a democracy should be made.

Mr. FRANKS. We have a very distinguished panel of witnesses today, and each of the witnesses' written statements will be entered into the record in its entirety. And I ask each witness to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a light on your table. When the light switches from green to yellow, you will have approximately 1

minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Our first witness is Ms. Maggie Gallagher. Ms. Gallagher is chairman and cofounder of the National Organization for Marriage, which the Washington Post described as the preeminent national organization fighting to protect marriage as the union of a husband and wife. A veteran of public debates over family fragmentation and the importance of marriage for child well-being, she is a nationally syndicated columnist and the author of three books on marriage, including most recently The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially, which she coauthored with University of Chicago professor Linda Waite. Her book, Debating Same-Sex Marriage, coauthored with Professor John Corvino, is forthcoming from Oxford University Press.

Our second witness is Mr. Carlos Ball, professor of law, and Judge Frederick Lacey Scholar at Rutgers Law School. Professor Ball studies, writes, and teaches in the field of sexual orientation and the law, and he is the author of several books on sexuality and the law.

Our third witness is Mr. Edward Whelan. Mr. Whelan is president of the Ethics and Public Policy Center, and the director of EPPC's program on The Constitution, the Courts, and the Culture. Mr. Whelan served as Principal Deputy Assistant Attorney General in the Office of Legal Counsel in the George W. Bush administration. Previous to his stint at OLC, Mr. Whelan served as a law clerk to Justice Antonin Scalia and as a senior staffer to the Senate Judiciary Committee.

It is the custom of this Committee to swear in the witnesses. So if you will stand and raise your right hand.

[Witnesses sworn.]

Chairman FRANKS. I now recognize our first witness Ms. Gallagher. Ms. Gallagher, you are recognized for 5 minutes.

TESTIMONY OF MAGGIE GALLAGHER, CHAIRMAN OF THE BOARD, NATIONAL ORGANIZATION FOR MARRIAGE

Ms. GALLAGHER. Thank you very much, Chairman Franks, for holding this hearing and for inviting me to participate in it.

I also thank you particularly, Representative Conyers, for your remarks on the importance of tone, because I do thinks it is extremely important that we demonstrate respect to each other in the middle of this issue, which can be passionate on both sides.

I am going to let Mr. Whelan explain the history of the Department of Justice's failure to defend DOMA, and I would like to do two big things today very briefly: One, explain the value of protecting marriage as the union of one man and one woman, which is, of course, not only the Federal policy under the Defense of Marriage Act, but is also the law and the policy of 45 States. And, secondly, I want to address briefly some Federalist concerns that have been raised by Congressman Nadler, among some others.

Marriage is the union of a husband and wife for a reason. These are the only unions that can create new lives and connect those children in love to their mother and father. This is not necessarily the reason why individuals marry. This is the great reason, the

public reason, why government gets involved in the marriage business in the first place, because, let us face it, the idea of a government license to be in a romantic relationship is a somewhat odd idea. What makes sense of it in our Anglo-American tradition is the recognition that there is something special about unions of husbands and wives, and that there is a unique public interest involved in bringing together male and female to make and raise the next generation.

How does marriage protect children? I think it is important to note that it is not the case that there is a package of legal benefits that protect children and improve their well-being. From what we know from the social science evidence, marriage protects children to the extent that it increases the likelihood they are born to and raised by their own mother and father in a low-conflict, enduring relationship. We know this because, frankly, children do not do better when their parents—under remarried parents than they do with solo mothers on average, which means that it is not simply a set of legal benefits that we can transform. It is the extent and way to which marriage as a legal and public institution helps to protect this particular kind of family that it helps to protect children or fails to protect children.

This deep orientation of marriage to what we now call responsible procreation is not only the consensus of most of human history. Marriage is a virtually universal human social institution. It changes in a lot of ways, but virtually every known human society has recognized that there is a unique need and a special interest in bringing together men and women as husbands and wives to make and raise the next generation. It is also deeply embedded in U.S. law.

You know, we can go back to where the Supreme Court said in 1888 that marriage is the foundation of the family and of society, without which there would be neither civilization nor progress, right up through one of the four rationales for the Defense of Marriage Act, which President Obama's Department of Justice specifically rejected, exercising in effect the kind of line-item veto over the law retrospectively. But Congress, in passing DOMA, said that civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.

If we accept, as DOMA explicitly does, that this is a core public purpose of marriage, then treating same-sex unions as marriage makes little sense. If, in fact, marriage as a public and legal institution, as the majority of courts have recognized, is oriented toward protecting children by increasing the likelihood they have a mother and father, then same-sex couples do not fit. And conversely, if same-sex couples fit the public definition of marriage, then marriage is really no longer about responsible procreation in the sense same-sex marriage cuts marriage off as a public idea from these deep roots in the natural family, and over time will reeducate the next generation that these ancient and honorable ideals underlying marriage no longer apply. Both gay marriage advocates and opponents have recognized that same-sex marriage will change the public meaning of marriage.

I would like to add, what about other families? Marriage has never been the only root to a family in our culture, and I believe we have an obligation to help children in all families, regardless of family forms. But we cannot help children by ripping up the roadmap laid down by history, common sense, and the collective wisdom of human experience by redefining marriage.

I believe that gay marriage will not only—same-sex marriage will not only redefine marriage as an institution, it will redefine the relationship between traditional-faith communities and the American tradition as well. The heart of the idea driving same-sex marriage is that there is no difference between same-sex and opposite-sex unions. And if you see a difference, there is something wrong with you. You are somehow akin to a bigot opposed to interracial marriage. That idea, if it is embraced by law, particularly through the courts, will have consequences for religious liberty that are profound.

How do we treat bigots who are opposed to interracial marriage in this country? Well, we don't—I am sorry, I am out of time.

Mr. FRANKS. Actually, Ms. Gallagher, the light malfunctioned there. It went from green to red. It wasn't supposed to do that. But if you will just conclude your remarks.

Ms. GALLAGHER. I will briefly wrap up.

If you follow that analogy, you will see the profound consequences.

The Federal Government frequently defines marriage, parent, family, and domestic relations differently than some States. Federalism works both ways. And if we were to say there was a problem with the Federal definition of marriage as one man and one woman on Federalist grounds, we would also have to accept that four judges in Massachusetts could force the Federal Government to acknowledge polygamist marriage as well.

Thank you very much.

Mr. FRANKS. Thank you, Ms. Gallagher. And I am sorry about the malfunction of the clock there.

[The prepared statement of Ms. Gallagher follows:]

United States House of Representatives

Committee on the Judiciary

Subcommittee on the Constitution

Hearing on "Defending Marriage"

April 15, 2011

Statement of Maggie Gallagher
National Organization for Marriage

Why DOMA's Definition of Marriage Is Good Policy and Should Be Defended

The Defense of Marriage Act, passed in 1996 by overwhelming bi-partisan majorities, does two things: it defines marriage for purposes of federal law as the union of one man and one woman, and it clarifies that states do not have to recognize same-sex marriages or polygamous marriages performed in other states or countries.

My purpose today is to defend the first idea: federalism works both ways: states have a right to regulate marriage for the purpose of state law; and the federal government has the right and responsibility—frequently exercised in U.S. history—to define what it means by marriage for the purpose of federal law.

Why Marriage is the Union of One Man and One Woman

Marriage is the union of husband and wife for a reason: these are the only unions that create new life and connect those children in love to their mother and father. This is not necessarily the reason why an individual person marries.

Individuals marry for a hundred private and personal reasons, for good reasons and less good reasons. The public purpose of marriage is the reason why society creates laws around marriage. Here the great public purpose of marriage has always been "responsible procreation"—rooted in the need to protect children by uniting them with the man and woman who made them.

Let's face it: a government license for romantic unions is a strange idea. Adults' intimate relationships, in our legal tradition, are typically nobody else's business. The more intimate and personal an adult relationship is the less likely the law is to be involved. I'm an aunt, I'm a best friend, I'm a mentor, I'm a godmother. In all these personal relationships the government is not involved.

Why is the government involved in marriage?

The answer in our society, and in virtually every known human society, is that the society recognizes there is an urgent need to bring together men and women to make and raise the next generation together. Marriage is a private desire that serves an urgent public good.

How does marriage protect children?

Marriage protects children by increasing the likelihood that children will be born to and raised by their mother and father in one family—and by decreasing the likelihood that the adults will create fatherless children in multiple households.

Note there is not some slew of magic special legal benefits that protect children that can be transferred to other family forms. We know this from the social science evidence showing that children do no better, on average, in remarried families than they do living with single mothers.[1] Marriage protects children to the extent that it helps increase the likelihood that children will be raised by their mother and father.

This is not merely my personal and private view; it is the overwhelming consensus of human history and U.S. law.

Marriage is a virtually universal human institution. Every human society has to grapple with three persistent facts about human beings everywhere: sex makes babies, societies need babies, babies deserve a father as well as a mother.

Marriage as a shared legal and social institution attempt to shape the erotic passions of the young, to communicate the importance of regulating sexual passion so that children are not born into fragmented families, and also to signal to those attracted to the opposite sex the time and place when uniting sexual desire and the desire for children is a positive good. Professors Margo Wilson and Martin Daly write:

> Marriage is a universal social institution, albeit with myriad variations in social and cultural details. A review of the cross-cultural diversity in marital arrangements reveals certain common themes: some degree of mutual obligation between husband and wife, a right of sexual access (often but not necessarily exclusive), an expectation that the relationships will persist (although not necessarily for a lifetime), some cooperative investment in offspring, and some sort of recognition of the status of the couple's children. The marital alliance is fundamentally a reproductive alliance.[2]

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[1] *See* Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* (Harvard U. Press 1994) ("In general, compared with children living with both their parents, young people from disrupted families are more likely to drop out of high school, and young women from one-parent families are more likely to become teen mothers, irrespective of the conditions under which they began to live with single mothers and irrespective of whether their mothers remarry or experience subsequent disruptions."). For a general review of the social science and legal history outlined here, *see* Maggie Gallagher, "(How) Will Gay Marriage Weaken Marriage as a Social Institution," 2 *University of St. Thomas Law Review* 33 (2004).

[2] Margo Wilson & Martin Daly, "Marital Cooperation and Conflict," in *Evolutionary Psychology, Public Policy and Personal Decisions* 197, 203 (Charles Crawford & Catherine Salmon eds., Lawrence Erlbaum Assoc., 2004).

Another academic treatment notes: "The unique trait of what is commonly called marriage is social recognition and approval . . . of a couple's engaging in sexual intercourse and bearing and rearing offspring."[3] As far back as 30 A.D., Musonious Rufus said:

> The husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals.[4]

This deep orientation of marriage to what we now call "responsible procreation" is also the consensus deeply embedded in U.S. law. The U.S. Supreme Court said in 1888:"[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."[5] In 1942, the Court said: "Marriage and procreation are fundamental to the very existence and survival of the race."[6] The Court quoted this latter statement and cited the former in its landmark case striking down antimiscegenation laws.[7]

This is the rationale for the national definition of marriage proposed by Congress in passing DOMA: "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing."[8]

If we accept, as DOMA explicitly does, that this is a core purpose of marriage, then treating same-sex unions as marriages makes little sense. If marriage as a public and legal institution is oriented towards protecting children by increasing the likelihood they are born to and raised by the man and the woman whose union made them, then same-sex couples do not fit. If same-sex couples "fit" the public definition of marriage, then marriage is no longer about responsible procreation.

Same-sex marriage cuts marriage as a public idea off from these deep roots in the natural family. Over time the law will re-educate the next generation that these ancient and honorable ideals underlying marriage no longer apply. Gay marriage, as Judge Walker ruled in wrongly striking down Prop 8, is based on the idea that neither biology nor gender matters to children. Same-sex marriage repudiates the public's interest in trying to see that children are, to the extent possible, raised by the man and woman whose bodies made them in a loving single family.

Both gay marriage advocates and opponents have recognized that gay marriage has this radically transformative change in the public meaning of marriage. For example, same-sex marriage proponent E.J. Graff explained: "If same-sex marriage becomes legal, that venerable institution will

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[3] Kingsley Davis (ed.), *Contemporary Marriage: Comparative Perspectives on a Changing Institution* 5 (New York: Russell Sage Foundation, 1985).
[4] Musonius Rufus, Fragment 13A, "What Is the Chief End of Marriage?" translated in *Musonius Rufus: The Roman Socrates* 89 (Cora E. Lutz ed. & trans., 1947).
[5] Maynard v. Hill, 125 U.S. 190, 211 (1888).
[6] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[7] Loving v. Virginia, 388 U. S. 1, 12 (1967).
[8] House Report, No. 104-664.

ever after stand for sexual choice, for cutting the link between sex and diapers." Same-sex marriage, she argues, "does more than just fit; it announces that marriage has changed shape."[9] Ladelle McWhorter acknowledged: "[Heterosexuals] are right, for example, that if same-sex couples get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well."[10]

What about other families? Marriage has never been the only pathway to a family. People have always lived in different situations, and we have (I believe) an obligation to help children in every family form. But we cannot do so by confusing the public purposes of marriage with other kinds of relationships. We should not rip up the road map laid down by history, by common sense, and by the collective wisdom of human experience by redefining marriage.

Gay Marriage Will Have Consequences

The great animating idea behind same-sex marriage is this: there are no relevant differences between same-sex and opposite sex unions, and if you see a difference there's something wrong with you. You are like a bigot opposed to interracial marriage.

When the law endorses this big new moral idea, under the misguided name of equality, it will have consequences.

If you want to see what this big new idea, embraced by law, means, ask yourself: how do we treat bigots who oppose interracial marriage. If we—and the law—accept the core ideas driving same-sex marriage, we will also have to accept the consequences for traditional faith communities, for those Americans who continue to believe that marriage is the union of husband and wife.

Already we are seeing graduate students kicked out of marriage counseling programs, physicians told they must choose between their values and their profession, Christian adoption agencies put out of business by the government. It's a felony to run an adoption agency without a license in the state of Massachusetts. When Catholic
Charities asked the government for a narrow exemption so that they could continue to help needy children without violating Catholic teachings, the government said, "no, we would not do this if you refused to place couples with interracial couples, so we won't help you quote, unquote discriminate against same-sex couples either." Crystal Dixon was fired from her job at a university for expressing in a letter to the editor her opposition to gay marriage.

In our sister democracies, Canada and the U.K., the cancerous effects of this false equation of gay marriage and racial equality are starkly visible. Just a few weeks ago a court ruled that lovely black married couple, Mr. and Mrs. Johns, could be barred from fostering children because they were unable to actively affirm homosexuality as good.

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[9] E.J. Graff, "Retying the Knot," in *Same-Sex Marriage: Pro and Con: A Reader* 134, 135-137 (Andrew Sullivan ed., 1st ed., Vintage Books 1997).
[10] Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (Indiana U. Press 1999).

Every day brings new evidence of the great lie that this movement is concerned only about helping our gay friends and neighbors live as they choose. This movement aims to follow the path laid down by the civil rights movement and use the power of government to reshape society by repressing, stigmatizing and excluding those who do not share their vision of "marriage equality."

Let me issue here today a clear warning: If gay marriage is accepted in law, then the consequences will be not only a redefinition of marriage, but a redefinition of the place of traditional faith communities in the American public sphere. What lies ahead is in my view best captured by the Islamic term "dhimmitude." Christian, orthodox Jewish,
Muslim and other traditional faith communities will be permitted to exist, as second class citizens, subjected to dramatic new legal restraints designed to minimize the influence of their so-called "anti-equality" ideas in the public square.

Another way of putting this emerging conflict is: when equality and religious liberty come into conflict, religious liberty loses.[11] By defining gay marriage as an "equality" issue gay marriage advocates are ensuring that gay marriage will not only facilitate private relationships of gay couples, it will create a substantive new government-backed morality enforced in the public square.

DOMA thus protects against a radical redefinition not only of marriage but of the American and the Judeo-Christian tradition.

Failing to Defend DOMA Invites Courts to Recognize Polygamous Unions as Well

The federal government has a right to define marriage for federal purposes, whether the issue is same-sex marriage or polygamy. This right has long been recognized in U.S. law and constitutional governance and does not conflict with federalism.

The federal government has frequently defined terms like "marriage" and "children" and "spouse" for the purpose of immigration, taxes, the Census and other areas in ways that sometimes are different from state law. The alternative to a proper federalism is to make the 10th amendment a kind of reverse supremacy clause in which four judges on a court in Massachusetts get to decide for the American people as a whole what constitutes a marriage.

Professors Linda Elrod and Robert Spector have noted: "Probably one of the most significant changes of the past fifty years [in American family law] has been the explosion of federal laws . . . and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as . . . domestic violence, and division of pension plans."[12]

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[11] *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, Robin Fretwell Wilson, Douglas Laycock, & Anthony Picarello, editors (Rowman & Littlefield 2008).
[12] Linda D. Elrod & Robert G. Spector, "A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue," 42 *Fam. L.Q.* 713, 713, 751 (2009).

Definitions of marriage and family are deeply embedded in federal laws ranging from immigration,[13] land grants,[14] military benefits and pensions,[15] other pensions,[16] the census,[17] copyright,[18] and bankruptcy.[19]

Congress has defined marriage for federal law purposes in the law of immigration,[20] taxation[21] and the Census[22] even though these definitions are sometimes contrary to the definitions of marriage for the state in which the affected individuals live.

As a nation, we settled this question in the 19th century when the issue was polygamy. The national government passed multiple laws to ensure that polygamy did not become the norm in the U.S.[23]

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[13] Naturalization Act of 1802, 2 Stat. 153 (1802); Act of Feb. 10, 1855, 10 Stat. 604 (1855).

[14] Act of Mar. 3, 1803, 2 Stat. 229 (1803); Land Act of 1804, 2 Stat. 283 (1804); Homestead Act of 1862, 12 Stat. 392 (1862); McCune v. Essig, 199 U.S. 382 (1905).

[15] Act of July 4, 1836, ch. 362, 5 Stat. 127, 127–28 (1836); Act of June 27, 1890, ch. 634, 26 Stat. 182, 182–83 (1890); See United States v. Jordan, 30 C.M.R. 424, 429–30 (1960) (finding that the military could limit the defendant's right to marry abroad because of special military concerns); United States v. Richardson, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); United States v. Rohrbaugh, 2 C.M.R. 756, 758 (1952) (noting, inter alia, that common law marriages are specifically recognized "in a variety of matters").

[16] *See* Boggs v. Boggs, 520 U.S. 833, 854 (1997) (pensions governed under ERISA, which preempts community property law); Mansell v. Mansell, 490 U.S. 581, 594–95 (1989) (military retirement pay waived in order to collect veterans' disability benefits governed by Uniformed Services Former Spouses' Protection Act (USFSPA), not community property law); McCarty v. McCarty, 453 U.S. 210, 232–33, 236 (1981) (citing Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979)), superseded by Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)); Hisquierdo, 439 U.S. at 582, 590 (railroad retirement assets governed by federal law, not community property law); Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); Wissner v. Wissner, 338 U.S. 655, 658 (1950) (National Service Life Insurance Act governs beneficiary of policy, not community property laws).

[17] U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 9 (2002), available at http://www.census.gov/prod/2002pubs/pol02-ma.pdf.

[18] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831); De Sylva v. Ballentine, 351 U.S. 570, 582 (1956); 19 17 U.S.C. § 101 (2006); KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 6.5 (1982).

[19] H.R. REP. NO. 95-595, at 364 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320; Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984) (bankruptcy courts look to federal—not state—law to determine whether obligation is in the nature of alimony, maintenance or support); Stout v. Prussel, 691 F.2d 859, 861 (9th Cir.1982).

[20] *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e); In re Appeal of O'Rourke, 310 Minn. 373, 246 N.W.2d 461, 462 (Minn. 1976); Kleinfield v. Veruki, 173 Va. App. 183, 372 S.E. 2d 407, 410 (Va. Ct. App. 1988); Lutwak v. United States, 344 U.S. 604, 611 (1953); id. at 620–21 (Jackson, J., dissenting); see also Adams v. Howerton, 673 F.2d 1036, 1040–41 (9th Cir. 1994) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979)(arguing that the possibility of marriage being a sham is irrelevant because of valid New Mexicomarriage is deemed "frivolous" because of INS' authority to inquire into marriage for immigration purposes); United States v. Sacco, 428 F.2d 264, 267–68 (9th Cir. 1970) (ruling, inter alia, that a bigamous marriage did not count as a marriage for federal law purposes).

[21] 26 U.S.C. § 7703(a)(2), (b) (definitions of marital status); Rev. Rul. 76-255, 1976-2 C.B. 40. *See* Linda D. Elrod & Robert G. Spector, "A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue," 42 *Fam L. Q.* 713, 714–15 (2009)(discussing Nihiser v. Comm'r, 95 T.C.M. (CCH) 1531 (2008); Perkins v. Comm'r, 95 T.C.M (CCH) 1165 (2008); Proctor v. Comm'r, 129 T.C. 92 (2007); 73 Fed. Reg. 37997 (July 2, 2008)).

[22] "Census to Recognize Same-Sex Marriages in '10 Count," *N.Y. Times*, June 21, 2009, available at http://www.nytimes.com/2009/06/21/us/21census.html?_r=1; "Census Bureau Urges Same-Sex Couples to be Counted," *USA Today*, April 6, 2010, available at http://www.usatoday.com/news/nation/census/2010-04-05-census-gays_N.htm.

[23] Statutes at Large, 37th Congress, 2d Session, Ch. 126 at http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532; 18 Stat. 253, 1874; Forty-seventh Congress, Sess. I, Ch. 47; 24 Stat. 635, 1887; Act of July 16, 1894, ch. 138, 28 Stat. 107; Statutes at Large, 37th Congress, 2d

And the issue may soon be polygamy again. Less than ten years after the Canadian courts imposed same-sex marriage, polygamists are now in court arguing for their right to marry as well. To say that the federal government must accept same-sex unions as marriages, if any state does, also means that the federal government must accept polygamous unions as marriages, if four judges on any state court decide the right to marry includes polygamy.

DOMA not only protect the idea that marriage united male and female, it protects monogamy as well: only one man and one woman are a marriage under federal law.

By failing to defend DOMA, and repudiating procreation as a purpose of marriage, Pres. Obama and the Department of Justice are actually endangering the marriage laws of 45 states.

The Supreme Court only rarely chooses to strike down laws passed by Congress directly. Eliminating DOMA would make it easier for gay marriage advocates to win the Prop 8 case now working its way through the 9th Circuit to the Supreme Court. Failing to defend DOMA, at this point, would invite the Supreme Court to strike down Prop 8 and marriage laws in 45 states.

Pres. Obama has Actively Sabotaged the Defense of DOMA

Ed Whelan lays out this argument in detail. I would like to quote, however, from a column by the distinguished libertarian legal scholar Richard Epstein, who favors same-sex marriage, and who opposes DOMA as policy (but believes it is eminently defensible on constitutional grounds) about how poor President Obama's legal defense of DOMA has been:

> In Gill and Massachusetts, Judge Tauro . . .pushed hard in two inconsistent directions. He first claimed that the definition of marriage was exclusively a function of state sovereignty, in which the United States could not intrude under the Tenth Amendment, which holds that those powers not delegated to the federal government remain vested in the states. Indeed, he went so far to make the weird claim that even the federal power to tax and spend did not allow it to define marriage for the purposes of federal expenditures.
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> . . .
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> But it only gets more convoluted. To strike down DOMA, Judge Tauro had to reject all state justifications for its definition of marriage. Congress advanced four such justifications for this statute: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources." The Justice Department disavowed them all. So much for tradition. Its sole defense of DOMA was that it was needed to preserve the status quo until matters were sorted out politically. Given that open invitation Judge Tauro concluded that all of the justifications offered in DOMA flunked even the lowest "conceivable" standard of rationality. Religious people will surely take umbrage at his one-sentence rebuttals of centuries of tradition.

Session, Ch. 126 at http://rs6.loc.gov/cgibin/ampage?collid=llsl&fileName=012/llsl012.db&recNum=532; Reynolds v. United States, 98 U.S. 145 (1878); Murphy v. Ramsey, 114 U.S. 15 (1885); Ex Parte Snow, 20 U.S. 274 (1887); Cannon v. United States, 116 U.S. 55, 72 (1885); The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890); Act of July 16, 1894, ch. 138, 28 Stat. 107.

> This controversial case might well go up on appeal. But if so, it looks almost like collusive litigation, unless some true defender of DOMA is allowed, as an intervener, to defend the statute on the merits.[24]

Fortunately the House has taken that step to be the true defender of DOMA, and to defend DOMA on the merits.

Conclusion

Marriage as the union of a man and a woman is the national norm, the consensus of state law, and of human history. Every single time the American people have had the chance to vote, 31 out of 31 times, they have affirmed that marriage is and should remain the union of husband and wife.

Exit polls from the election last November showed American people oppose same-sex marriage 54 to 40 percent.[25] Last November the people of Iowa showed their displeasure with gay marriage by refusing, for the first time in modern Iowa history, to retain three judges who voted to impose gay marriage. A few weeks ago, in the deep blue state of Maryland, an enormous outpouring of public opposition, especially from the black church, killed a gay marriage bill that was supposed to easily pass the Maryland House. In Rhode Island, another deep blue state, the same story is unfolding: after promising to quickly pass a gay marriage bill through the House, the speaker had to pull the bill and the headlines there indicate that they do not have the votes to pass.

This rejection of gay marriage, even in deeply Democratic and liberal states, is not due to any secret backroom influence, but to an amazing, great, underreported outpouring by the American people, a rainbow coalition of people of all races, creeds, and colors who say that while yes we may need to find a way to express concern about and compassion for our gay friends, neighbors and fellow citizens, no, please, don't mess with marriage.

The House leadership is to be congratulated for stepping forward and defending marriage by defending DOMA.

[24] Richard A. Epstein, "Judicial Offensive Against Defense of Marriage Act," *Forbes*, July 12, 2010 at http://www.forbes.com/2010/07/12/gay-marriage-massachusettssupreme-courtopinions-columnists-richard-a-epstein.html.
[25] CNN 2010 Exit Polls at http://www.cnn.com/ELECTION/2010/results/polls/#val=USH00p3.

Mr. FRANKS. Professor Ball, thank you for being here, sir. You are recognized for 5 minutes.

TESTIMONY OF CARLOS A. BALL, PROFESSOR OF LAW, RUTGERS SCHOOL OF LAW

Mr. BALL. Thank you, Mr. Chairman. Thank you for inviting me to speak to the Subcommittee today.

It seems to me that a good place to begin in assessing the President's decision to no longer defend the constitutionality of DOMA is with another Federal statute, 28 U.S.C. 530(d). That law requires the Attorney General to report to Congress when the Department of Justice decides not to defend a particular law.

The existence of that statute, it seems to me, is a recognition by the Congress of the reality that the executive branch sometimes decides in rare cases not to defend the constitutionality of a law. The executive branch, as a coequal branch of government, has the authority and obligation to make independent determinations regarding a law's constitutionality. Indeed, every Administration in the last 30 years, both Democratic and Republican, has refused at some point to defend laws that it believed were unconstitutional.

In my written statement, I provided the Subcommittee with the details of those six lawsuits in which an Administration refused to defend a Federal law in the courts. Congressman Nadler referred to one of them, the Metro Broadcasting case. The Department of Justice in that case, it seems to me, made a good-faith, independent determination that the statute was unconstitutional.

The Obama administration has done the same thing with DOMA. Some may disagree with one or both of those decisions, but that is a different question from whether the executive branch had the constitutional authority to make the decision.

It is also crucial to keep in mind the context in which President Obama made his decision. The Department of Justice was confronted with litigation challenging DOMA in a circuit that has never addressed the question of whether sexual orientation classifications are entitled to heightened scrutiny; yet the Administration had to make a decision on that question, and I believe it made a proper one.

Critics of the President's decision would like you to believe that it is well-settled law that only rational basis review applies to sexual-orientation classifications and that, therefore, the only thing the Administration had to do was to offer the courts a rational justification for the enactment of DOMA. But, in fact, the level of judicial review that should be applied in lawsuits alleging unconstitutional discrimination on the basis of sexual orientation is not well settled. The Supreme Court has never addressed the question, and what the Supreme Court has done in the last 15 years is to rule emphatically that the rights of privacy and equality that lesbians and gay men enjoy under the Constitution impose limitations on governmental action.

In determining whether heightened scrutiny applies, courts have sought to answer questions such as whether lesbians and gay men have suffered a long history of discrimination, and whether sexual orientation affects the ability of individuals to contribute to society. It seems to me entirely appropriate for an Administration to make its own judgment on these issues, especially when there is no binding case law in the circuit in question.

Furthermore, not only was the President entitled to make a decision on the question of heightened scrutiny; that decision that he made was the correct one. There has, in fact, been a long history of discrimination in this country on the basis of sexual orientation. To argue otherwise is to turn a blind eye to the long list of ways in which governments at every level, private employers, and others have discriminated for decades against gay people.

As to the ability to contribute to society, we all know that there are lesbians and gay men in this country who are doctors, lawyers, scientists, engineers, and even Members of Congress. It is simply not credible anymore to argue that sexual orientation affects the ability of individuals to be useful and productive members of society.

On the particular question of marriage, there are those who argue that sexual orientation is still relevant because marriage is supposedly only about procreation in what some believe is the optimal setting for the raising of children. But procreation, as Justice Scalia noted in his dissenting opinion in *Lawrence v. Texas*, cannot be the basis for excluding gay people from marriage because those who are sterile and elderly are allowed to marry.

And on the issue of child rearing, it is indisputable that a wide consensus has emerged among experts in this country that what matters when it comes to the well-being of children is not the sexual orientation of the parents, but is instead the quality of the relationships and the amount of care, love, and support that parents provide their children.

Furthermore, the procreation and child-rearing arguments seem especially ill-suited in the context of the DOMA litigation. To see why this is the case, we need to look no further than the case of Edie Windsor, which Congressman Nadler mentioned in his opening remarks. Edie and her partner Thea were together for 44 years. Their 2007 Canadian marriage was recognized by the State of New York, but the IRS refused to recognize their marriage because of DOMA. So when Thea passed away in 2009, her estate had to hand over $350,000 to the Federal Government in estate taxes.

Edie is now 81 years old. What do procreation and child rearing have to do with a rational reason for denying Edie money that she needs in order to live comfortably in her old age? Is the idea to encourage Edie to marry a man? Is it the idea that more heterosexuals will marry if they can rest assured that Edie's marriage, which is recognized by New York, cannot be recognized by the Federal Government under DOMA? Of course not. In the end, there is no rational reason to impose a huge tax obligation on Edie that is not imposed on other New York widows. And that is just one example of why DOMA is unconstitutional.

Thank you very much, Mr. Chairman.

Mr. FRANKS. Thank you, Professor Ball.

[The prepared statement of Mr. Ball follows:]

Testimony of Carlos A. Ball

Subcommittee on the Constitution of the U.S. House Committee on the Judiciary

April 15, 2011

Good morning, Mr. Chairman and members of the subcommittee. Thank you for granting me the opportunity to testify before you this morning. My name is Carlos Ball and I am a law professor at Rutgers University (Newark).

In assessing the President's decision not to defend the constitutionality of Section 3 of the Defense of Marriage Act of 1996 (DOMA), it is important to keep in mind historical, institutional, and contextual considerations. I would like to briefly go through each of these to argue that the President's decision on DOMA was both legitimate and appropriate.

I. HISTORICAL CONSIDERATIONS

It is undoubtedly the case that the executive branch, most of the time, has an obligation to defend the constitutionality of laws enacted by Congress. This obligation recognizes both that Congress, along with the President, sets policy and that it is the courts that are the final arbiters of the constitutionality of our laws.

But on some occasions, it is appropriate for the executive branch to refuse to defend laws that it believes are unconstitutional. Former Solicitor General (and later Judge) Robert Bork put this point well when he noted almost forty years ago that his office's standing before the Supreme Court

> rests . . . upon a sense of obligation to the Court and to the constitutional system so that we often behave less like pure advocates than do lawyers for private interests . . . [I]t would seem to me not only institutionally unnecessary but a betrayal of profound obligations to the Court and to Constitutional processes to take the

simplistic position that whatever Congress enacts, we will defend . . . .[1]

Judge Bork's views on this issue are consistent with the idea that the executive branch has an independent responsibility to assess the constitutionality of federal statutes. In fact, *every* administration over the last thirty years, both Democratic and Republican, at some point exercised its authority to refuse to defend laws that it believed were unconstitutional. Here are some examples:

- In 1983, the Department of Justice under President Ronald Reagan refused to defend the constitutionality of a law that allowed either House of Congress to invalidate an administrative decision made by the executive branch.[2]
- In 1990, the Department of Justice under President H.W. Bush filed an amicus brief with the Supreme Court arguing that the Court should *strike down* statutory provisions related to regulatory preferences for minority owned stations. Far from suggesting that the Court should be deferential in its constitutional assessment of the statutes in question, the Department of Justice urged the Court to apply strict scrutiny.[3]
- In 1992, the Department of Justice under the first President Bush informed the

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[1] Letter from Robert H. Bork, Solicitor General, to Simon Lazarus III (Aug. 5, 1975), reprinted in Representation of Congress and Congressional Interests In Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong. 351, 500-01 (1975) (quoted in Seth Waxman, *Defending Congress*, 79 N.C.L. REV. 1073, 1083 (2000)).

[2] INS v. Chada, 462 U.S. 919, 959 (1983).

[3] Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990). It bears noting that the Department of Justice's position that strict scrutiny should be applied to statutes that provided for racial preferences seemed inconsistent with prior Supreme Court rulings. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980). Although the Court refused to follow the administration's advice in *Metro Broadcasting*, it did later apply strict scrutiny to race-based preferential programs in Adarand Construction v. Pena, 515 U.S. 200 (1995).

district court that it would not defend the constitutionality of provisions in the Cable Television Act of 1992 that required cable companies to carry certain content.[4]

- In 1996, the Department of Justice under President Bill Clinton decided not to defend a statute requiring the military to discharge service members who were HIV-positive.[5]
- In 1999, the Department of Justice under President Bill Clinton refused to defend the constitutionality of a congressional law that sought to limit rights under the Supreme Court's 1966 decision in *Miranda v. Arizona*.[6]
- In 2004, the Department of Justice under President George W. Bush refused to defend a federal law that prohibited the placement of marijuana reform ads on public transportation systems.[7]

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[4] Turner Broadcasting System v. F.C.C., 512 U.S. 622 (1994). The decision not to defend the constitutionality of the statute was reversed by the Department of Justice under President Bill Clinton. *See* Waxman, *supra* note 1, at 1084. This reversal shows that simply because there are professionally responsible arguments that can be made on behalf of the constitutionality of a law does not mean that an administration, which believes that that statute is unconstitutional, must adopt them. In other words, the fact that the Clinton Administration adopted the legal position that the statute was constitutional suggests that there was a professionally responsible argument to make on behalf of the law's validity. Yet, this did not stop the Department of Justice under President Bush from refusing to defend the statute.

[5] Letter from Assistant Attorney General Andrew Fois to Senator Orrin Hatch, Match 22, 1996.

[6] 384 U.S. 436 (1966). The Supreme Court struck down the statute in Dickerson v. United States, 530 U.S. 428 (2000).

[7] Letter from Solicitor General Paul Clement to Senate Legal Counsel, December 23, 2004 (explaining the reasons for refusing to defend federal statute subject to challenge in ACLU v. Mineta, 04-0262 (D. DC)).

This partial list[8] of examples shows that there is considerable historical precedent for the idea that the President and the Attorney General are entitled, on rare occasions, to refuse to defend laws they believe are unconstitutional. The examples support the view that the executive branch has the authority and obligation to make independent determinations regarding a law's constitutionality. It is simply not the case, as some have contended, that the Obama Administration's refusal to defend the constitutionality of DOMA is unprecedented.

II. INSTITUTIONAL CONSIDERATIONS

It is also important, in assessing the appropriateness of President Obama's decision, to keep in mind that Congress recognized the reality that the executive branch sometimes decides, in rare circumstances, not to defend the constitutionality of a law when it enacted 28 USC §530D. As you know, that law requires the Attorney General to report to Congress instances in which the Department of Justice decides not to defend or enforce a particular federal law.

If Congress attempted to go beyond §530D and actually tried to limit the ability of the executive branch to apply its own independent judgment regarding the constitutionality of laws, that effort would raise serious separation of powers concerns.

It seems to me that 28 USC §530D gets it exactly right when it focuses on the issue of notification because notification allows the Congress to decide whether it wants to intervene in the lawsuit to defend the constitutionality of the statute in question. This is precisely what happened in

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[8] For additional examples, see Waxman, *supra* note 1. *See also* Letter from Assistant Attorney General Fois, *supra* note 5. The Senate Legal Counsel in the early 1990s compiled a list showing forty-five instances between 1975 and 1993 in which the Department of Justice communicated to Congress that it would decline to either defend or enforce a statute because of the administrations' view that the law in question was unconstitutional. *See id.* at 8.

the 1980s when the Reagan Administration refused to defend the constitutionality of the so called "one-House" veto provision. In that instance, Congress took the legal case over from the administration and proceeded to defend the constitutionality of the statute in the courts.[9]

We should remember, then, that an administration's decision not to defend the constitutionality of a law does not deprive the Congress of either the authority or the ability to mount a vigorous defense of that law in the courts. In fact, I would think that supporters of DOMA would prefer that the law be defended by those who believe it is constitutional rather than by those who believe it is not.

III. CONTEXTUAL CONSIDERATIONS

Finally, it is essential, in assessing the appropriateness of the President's decision,, to take into account the specific context in which it arose. The decision not to defend DOMA's constitutionality came in response to two lawsuits challenging the statute filed in district courts in the Second Circuit.[10] This is important because that circuit has not decided the issue of whether sexual orientation classifications require courts to apply heightened scrutiny. As a result, the Administration was directly confronted with the legal question of what degree of deference courts should give to sexual orientation classifications in a circuit where that question had not been addressed by the courts.

Critics of the President's decision would like you to believe that it is well-settled law that

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[9] INS v. Chada, 462 U.S. 919, 959 (1983).

[10] *Pedersen v. Office of Personnel Management*, No. 10-CV-1750 (D.Conn.); *Windsor v. United States*, No. 10-CV-8435 (S.D.N.Y.).

only rational basis review applies to sexual orientation classifications and that therefore the only thing that the Administration has to do is offer courts a rational justification for the enactment of DOMA.

But, in fact, the level of judicial review that should be applied in lawsuits that allege unconstitutional discrimination on the basis of sexual orientation is not well-settled. This is the case for four different reasons. First, the Supreme Court has never addressed the question. Although it is sometimes claimed that the Court in *Romer v. Evans* decided the level of scrutiny issue,[11] it in fact never reached that question, deciding only that the Colorado provision at issue could not survive even the lowest level of scrutiny.[12]

Second, even though some circuits held in the 1980s and 1990s that sexual orientation classifications were not entitled to heightened scrutiny, those courts did so on the ground that if the government could criminalize consensual same-sex activity—as the Supreme Court held it could in *Bowers v. Hardwick*[13]—then sexual orientation should not be awarded heightened scrutiny.[14] That reasoning became impossible to sustain after the Supreme Court overruled *Hardwick* in *Lawrence v. Texas*.[15]

Third, the question of the appropriate level of review has become unclear after the Supreme

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[11] *See, e.g.,* Schroeder v. Hamilton School District, 282 F.3d 946, 951 (7th Cir. 2002).

[12] 517 U.S. 620 (1996).

[13] 478 U.S. 186 (1986).

[14] *See, e.g.,* Woodward v. United States, 871 F.2d 1068, 1075 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

[15] 539 U.S. 558 (2003).

Court emphatically held in *Lawrence* and in *Romer* that the rights to privacy and equality that lesbians and gay men enjoy under the Constitution impose meaningful limitations on governmental action. And, finally, several state supreme courts have recently held that sexual orientation classifications must survive heightened scrutiny.[16] Although these decisions were based on interpretations of state constitutions, the state courts generally applied the same criteria used by the federal courts to determine whether heightened scrutiny was appropriate.

It is by no means clear, therefore, that rational basis review applies to sexual orientation classifications. This is especially true in a circuit, like the Second Circuit, in which the issue has not been addressed by the courts. This uncertainty made it entirely appropriate for the Administration to have reached an independent judgment regarding the legal position it wished to take on the question of heightened scrutiny.

In determining whether heightened scrutiny applies, courts have sought to answer questions such as whether lesbians and gay men have suffered a long history of discrimination and whether sexual orientation affects the ability of individuals to contribute to society. It is within the constitutional discretion of the President to make his own judgment on these issues, especially when there is no binding caselaw in the circuit in question.

To claim that the Administration somehow has an obligation to argue that lesbians and gay men have *not* suffered a long history of discrimination and that sexual orientation *is* relevant in determining a person's ability to contribute to society makes absolutely no sense when those positions are inconsistent with the Administration's clearly expressed views. The executive branch

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[16] *See, e.g.*, In re Marriage Cases, 183 P.3d 384 (Ca. 2008); Kerrigan v. Comm. of Pub. Health, 957 A.2d 407 (Ct. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

does not have a constitutional obligation to make legal arguments in the courts that are grounded in propositions that it believes are fundamentally wrong.

Furthermore, not only was the President entitled to make a decision on the question of heightened scrutiny, the decision he made was the correct one. There has in fact been a long history of discrimination in this country on the basis of sexual orientation. To argue otherwise is to turn a blind eye to the way in which, until only a few years ago, many states criminalized consensual sexual conduct between gay adults in the privacy of their homes. In addition, gay civil servants for decades were investigated and thrown out of the civilian branches of the federal government. And, of course, until Congress repealed the "Don't Ask, Don't Tell" statute last December, thousands of gay Americans who served their country with distinction and honor were expelled from the military, often for doing nothing more than simply stating they were gay.[17] Finally, gay people continue to be the victims of hate crimes at an alarming rate. According to the FBI's statistics, hate crimes on the basis of sexual orientation, which account for almost 20% of all reported hate crimes in the country, are higher than for any category other than race or religion.[18]

As to the ability to contribute to society, we all know that there are lesbians and gay men who are doctors, lawyers, scientists, engineers, and even members of Congress. It is simply not credible anymore to argue that sexual orientation affects the ability of individuals to be useful and productive members of society.

On the particular question of marriage, there are those who argue that sexual orientation is still relevant because marriage is supposed to be about procreation and the optimal setting for raising

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[17] *See, e.g.*, Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

[18] *See* http://www.fbi.gov/news/pressrel/press-releases/2009hatecrimestats_112210.

children. But procreation, as Justice Scalia noted in his dissenting opinion in *Lawrence v. Texas*, cannot be the basis for excluding gay people from marriage because "the sterile and the elderly are allowed to marry."[19] And, on the issue of child rearing, it is indisputable that a wide consensus has emerged among experts in this country that what matters when it comes to the well-being of children is not sexual orientation but is instead the care, love, nurture, and support that parents provide to their children.[20]

Furthermore, the procreation and child rearing arguments seem especially ill-suited in the context of the DOMA litigation. The issue in those cases is not whether there is a federal constitutional right to same-sex marriage. Instead, the issue is whether the federal government is constitutionally entitled to treat some couples who are *already married* under the laws of their states differently from other couples who are also married under their state laws.

Indeed, we need to look no further than the facts of one of the ongoing Second Circuit cases to see why DOMA is constitutionally indefensible. The plaintiff in *Windsor v. United States* is an 81-year old woman from New York who was married to her female spouse in Canada in 2007.[21]

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[19] Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting). *See also* Varnum v. Brien, 763 N.W.2d 862, 902 (Iowa 2009) ("the sole conceivable avenue by which exclusion of gay and lesbian people from civil marriage could promote more procreation is if the unavailability of civil marriage for same-sex partners caused homosexual individuals to 'become' heterosexual in order to procreate within the present traditional institution of civil marriage. The briefs, the record, our research, and common sense do not suggest such an outcome.").

[20] *See, e.g.*, Affidavit of Michael Lamb, Ph.D., Gill v. Office of Personnel Management, No. 1:09-CV-1309 (D.C. Mass), November 11, 2009. *See also* In Re Matter of Adoption of X.X.G and N.R.G, 45 So.3d 79, 85 (Fla.Ct.App 2010) ("The quality and breadth of research available, as well as the results of the studies performed about gay parenting and children of gay parents, is robust and has provided the basis for a consensus in the field.").

[21] *Windsor v. United States*, No. 10-CV-8435 (S.D.N.Y.).

That marriage was recognized by New York, but not by the federal government. As a result, when Ms. Windsor became a widow in 2009, she was unable to claim the estate marital tax deduction. This meant that the federal government levied a tax of $350,000 on the estate. Arguments about procreation and the optimal setting in which to raise children do not help the government defend the rationality of this type of unfair, unjust, and quite frankly, un-American treatment of married couples when it comes to taxation.

Thank you very much for giving me the opportunity to participate in this hearing.

Mr. FRANKS. Now we will recognize Mr. Whelan for 5 minutes.

TESTIMONY OF EDWARD WHELAN, PRESIDENT, ETHICS AND PUBLIC POLICY CENTER

Mr. WHELAN. Thank you very much, Chairman Franks and Ranking Member Nadler. Thank you as well, Judiciary Committee

Chairman Smith, and to the other Members of the Subcommittee, for their interest in this important matter.

The Obama administration's decision to abandon its defense of DOMA, or more precisely to abandon its charade of pretending to defend DOMA, departs sharply from the Department of Justice's longstanding practice. Attorney GeneralHolder's explanation of that decision cannot be taken seriously on its own terms.

As the Administration's broader sabotage of DOMA litigation makes clear, the Obama administration has subordinated its legal duty to its desire to please a favored and powerful political constituency, and is eager to obscure from the American public its stealth campaign to induce the court to invent a constitutional right for same-sex marriage. Let me briefly amplify these points.

With the exception of laws that intrude on executive branch power, the longstanding practice of the Department of Justice is to vigorously defend the constitutionality of any law for which a reasonable defense may be made. This reasonable standard sets a very low bar. It basically means that the Department will defend a Federal law when it can offer nonfrivolous grounds in support of the law; in other words, when the law is not patently unconstitutional.

As Clinton administration Solicitor General Drew Days has explained, this reasonable standard affords Congress the respect to which it is entitled as a coordinate branch of government, and prevents the executive branch from using litigation as a form of postenactment veto of legislation that the current Administration dislikes.

Attorney General Holder claims to have acted consistent with this standard, but his claim is clearly wrong. Any competent lawyer could present plenty of reasonable arguments that DOMA shouldn't be subjected to heightened scrutiny. Indeed, all 11 Federal circuit courts to address the question have determined that classifications based on sexual orientation are subject to rational basis review. Any competent lawyer could likewise present plenty of reasonable arguments that even if heightened scrutiny were to apply, DOMA would satisfy that standard.

For all its flaws, the Obama administration's decision to abandon its former defense of DOMA has a modest virtue of making overt a far greater scandal that the Obama administration has been attempting to obscure; namely, that the Department has only been pretending to defend DOMA while it, in fact, has been actively sabotaging it.

Most starkly, in 2009, in what a supporter of same-sex marriage aptly described as a gift to the gay marriage movement, the Obama administration affirmatively repudiated the argument that DOMA is rationally related to legitimate governmental interests in responsible procreation and child rearing. Never mind that these grounds have proven successful in previous litigation against DOMA and have been invoked by Congress when it enacted DOMA. Not surprisingly, the lone judge to rule against DOMA relied heavily on the Department's concession.

Last fall, Assistant Attorney General Tony West admitted that the Department was modifying and diluting its legal arguments in DOMA cases to comport with what he called the Obama administration's policy values. According to a sympathetic account of his

remarks, Assistant Attorney General West also disclosed that the Department is working with its"liaison to the gay, lesbian, bisexual, and transgender community to make sure that future briefings don't advance arguments that they would find offensive."

In other words, a senior DOJ official was conceding that the Department was allowing the sensitivities of a favored political constituency to have extraordinary influence over how the Department defended or pretended to defend DOMA.

In sum, far from providing the vigorous defense of DOMA that it promised, the Obama administration undermined that litigation for the obvious purpose of pleasing a particular political constituency.

President Obama won election to his office maintaining that he opposes same-sex marriage and keeping contrary evidence buried. Even now, he and his Administration are attempting to obscure that his position that DOMA is unconstitutional clearly means that he also believes that traditional marriage laws are unconstitutional.

Given the Obama administration's dereliction of duty, the decision by the House of Representatives to step in to defend DOMA is entirely warranted. Indeed, that decision should be supported as a matter of principle by all House Members, whether or not they support DOMA.

The Department's irresponsible course of action is fully to blame for the House's need to incur legal fees in defending DOMA. Thus, although it is refreshing to witness concerns of fiscal frugality from some Members of the House not ordinarily associated with such concerns, those concerns are misdirected if they are deployed to question or oppose the House's retention of counsel. A far more sensible course is for the House to make clear that the sum to be appropriated for the Department will be reduced by the sum expended on legal fees in defense of DOMA or, better yet, by some healthy multiple of that sum.

Thank you.

Mr. FRANKS. Thank you, Mr. Whelan.

[The prepared statement of Mr. Whelan follows:]

United States House of Representatives

Committee on the Judiciary

Subcommittee on the Constitution

Hearing on "Defending Marriage"

April 15, 2011

Statement of Edward Whelan
President, Ethics and Public Policy Center

Thank you very much, Chairman Franks and ranking member Nadler, for inviting me to testify before this subcommittee on the Obama administration's recent decision to abandon defending—or, more precisely, as I will show, to abandon *pretending* to defend—the federal Defense of Marriage Act ("DOMA").

As I will explain in this statement, the Obama administration's decision to abandon defense of DOMA reflects a sharp departure from the Department of Justice's longstanding practice of defending congressional enactments. The Obama administration's own explanation of that decision cannot be taken seriously. Rather, as its broader sabotage of DOMA litigation makes clear, the Obama administration has subordinated its legal duty to its desire to please a favored and powerful political constituency, and it is eager to obscure from the public its stealth campaign to induce the courts to invent a constitutional right to same-sex marriage. As a matter of principle, all House members, whether or not they support DOMA, should vigorously support the House of Representatives' efforts to defend DOMA in court.

I offer my views in my capacity as president of the Ethics and Public Policy Center and director of EPPC's program on The Constitution, the Courts, and the Culture.[1] In that capacity, I have written and lectured widely on matters of constitutional law. I draw on my familiarity with the Department of Justice, including from my service as principal deputy assistant attorney general in the Office of Legal Counsel. I also draw on my broader experience over the past two decades in matters relating to constitutional law. In addition to my program work at EPPC and my stint in OLC, that experience includes

[1] The views I express in this statement and at the hearing are mine alone and are not to be imputed to EPPC as an institution.

serving as a law clerk to Justice Antonin Scalia and as a senior staffer to the Senate Judiciary Committee.

I

I will first outline the general principles that should govern a presidential administration in deciding whether and when to decline to defend a federal law against a constitutional challenge brought in federal court.

At the outset, it is essential to distinguish between laws that an administration opposes or disfavors on policy grounds only and laws that it regards as unconstitutional. When a president opposes a law on mere policy grounds, he is nonetheless obligated to defend it vigorously from constitutional attack. That obligation flows directly from the president's duty under Article II of the Constitution to "take Care that the Laws be faithfully executed," for the duty to faithfully execute, or enforce, a law entails acting to preserve the law's vitality against improper judicial invalidation.

The president's "take Care" obligation does not apply to laws that are unconstitutional, as the Constitution is first and foremost among the "Laws" that the president is dutybound to "take Care … be faithfully executed." In other words, the president is not obligated to enforce unconstitutional statues. Indeed, he is obligated *not* to enforce unconstitutional statues.

It is worth emphasizing the parallels between the president's authority to decline to enforce unconstitutional statutes and the president's authority to issue so-called constitutional signing statements, which present constitutional objections to provisions of legislation that the president is signing and which state whether and how the executive branch will enforce such provisions. In both cases, the president's authority is rooted in

his "take Care" obligation not to enforce unconstitutional provisions of law. In both cases, it would be wrong to contend (as some who should have known better did with respect to President George W. Bush's constitutional signing statements[2]) that no such authority exists. In both cases, one must carefully examine the particulars to determine the soundness of any specific exercise of that authority.

Recognizing the president's obligation not to enforce unconstitutional statutes leads to the difficult theoretical question how the president ought to go about deciding whether a particular law is unconstitutional and therefore ought not be enforced or defended. May he, for example, regard a law as unconstitutional only if the Supreme Court's precedents clearly dictate that it would so hold? Or may he form that judgment on his own, where the Court's case law is unclear or even where his judgment is contrary to, say, a recent unanimous ruling by the Court that the law is constitutionally permissible?

As it turns out, these questions have been much weightier in theory than in practice, at least insofar as the Department of Justice's duty to litigate in defense of a federal statute is at issue. Over the last several decades, presidential administrations with very different theoretical understandings of the president's authority to interpret the Constitution have embraced the general proposition that, with the exception of laws that intrude on the executive branch's constitutional prerogatives, the Department of Justice

[2] See, e.g., Report of American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, August 2006. Evidently indulging its political biases, the ABA task force, which included legal luminaries like Harold Koh, Kathleen M. Sullivan, and Judge Patricia M. Wald, somehow reached the widely discredited and badly confused conclusion that the longstanding practice of presidential constitutional signing statements is "contrary to the rule of law and our constitutional system of separation of powers." The ABA adopted the task force report, but has not seen fit to object to President Obama's continuation of the practice of issuing constitutional signing statements.

should vigorously defend the constitutionality of any law for which a *reasonable* defense may be made in the courts.

This "reasonable" standard sets a very low bar: it basically means that the Department of Justice will defend a federal law against constitutional challenge when it can offer *non-frivolous* grounds (or even a single non-frivolous ground) in support of the law. Given the wide range of accepted argument in the legal profession and the breadth of interpretive methodologies among federal judges, the "reasonable" standard is very easy to meet.

The consensus across presidential administrations on this easy-to-meet standard is nicely captured in the embrace by Drew S. Days III, Solicitor General in the Clinton administration, of testimony by Rex Lee, a senior DOJ official (and later Solicitor General) in the Reagan administration. In what Days described as possibly the "best formal statement of the Justice Department's policy of defending congressional statutes," Lee testified that the only situation (apart from a law intruding on executive-branch authority)

> in which the Department will not defend against a claim of unconstitutionality involves cases where the Attorney General believes, not only personally as a matter of conscience, but also in his official capacity as the Chief Legal [O]fficer of the United States, that a law is *so patently unconstitutional* that it cannot be defended. Such a situation is thankfully most rare.[3]

As Days explains, this consensus practice affords Congress "the respect to which [it] is entitled as a coordinate branch of government" and "prevents the Executive Branch from

[3] Drew S. Days III, "In Search of the Solicitor General's Clients: A Drama with Many Characters," 83 Ky. L.J. 485, 500-501 (1994-1995) (emphasis added).

using litigation as a form of post-enactment veto of legislation that the current administration dislikes."[4]

To be sure, presidential practice has not absolutely complied with this general consensus. In rare instances, as Clinton Justice Department official Walter Dellinger outlined in an op-ed last fall,[5] an administration has determined not to offer a substantive constitutional defense of a defensible law. Instead, it has pursued only a nominal defense: It has set forth in its briefs its position that the law is unconstitutional but has also filed a formal appeal from a decision adverse to the law in order to ensure that the judicial hierarchy can operate to correct a wrong decision. Further, as Dellinger explains, in those rare instances when an administration pursues the option of making only a nominal defense of a defensible law, the courts can and should invite other interested and capable persons to defend the law.

II

On February 23, 2011, the Obama administration announced that it would no longer defend Section 3 of the Defense of Marriage Act, which defines the word "marriage" for purposes of federal law to mean "only a legal union between one man and one woman as husband and wife." In a letter to congressional leaders[6] and in a separate

[4] Id. at 499, 502.

[5] Walter Dellinger, "How to Really End 'Don't Ask, Don't Tell,'" *New York Times*, Oct. 21, 2010; see also Letter from Assistant Attorney General Andrew Fois to Senate Judiciary Committee Chairman Orrin G. Hatch, March 22, 1996 (identifying instances in which the Department of Justice has declined to defend in court the constitutionality of laws that the executive branch has enforced).

[6] Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011, *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The quotations in this Part II are from this letter.

prepared statement,[7] Attorney General Eric Holder undertook to explain the Obama administration's decision. According to Attorney General Holder, President Obama "has made the determination that Section 3 …, as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment." What was said to have triggered President Obama's determination was the filing in November 2010 of two lawsuits against Section 3—*Windsor v. United States* and *Pedersen v. OPM*—"in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny." The Obama administration's previous defenses of Section 3 had come "in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and [the Department of Justice] has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases." The two new lawsuits, by contrast, "will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA in a circuit without binding precedent on the issue."

Listing four factors that Supreme Court decisions have "set forth … that should inform" the judgment whether heightened scrutiny applies to a particular classification, Attorney General Holder asserted, "Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation," and he offered very brief assessments of the four factors. He acknowledged both that the Supreme Court "has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation" and that "there is substantial circuit court authority applying rational basis review to sexual-orientation classifications." Among the reasons he offered for discounting the

[7] *Available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

"substantial circuit court authority" is that some of the decisions "rely on claims regarding 'procreational responsibility' that the Department has disavowed already in litigation as unreasonable."

President Obama, the Attorney General continued, "has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subjected to a heightened standard of scrutiny" and that Section 3 cannot meet that heightened standard. Therefore, "the President has instructed the Department not to defend" Section 3 in *Windsor* and *Pedersen*.

Attorney General Holder maintained that the Administration's decision not to defend Section 3 in *Windsor* and *Pedersen* was consistent with the Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." Under the Department's longstanding practice, he asserted, the Department "does not consider every plausible argument"—or every "professionally responsible" argument—"to be a 'reasonable' one."

Attorney General Holder further stated that he "will instruct Department attorneys to advise courts in other pending DOMA litigation"—that is, the pending cases in jurisdictions that subject classifications based on sexual orientation to rational-basis review—of the Obama administration's new position that a heightened standard should apply to Section 3, that Section 3 is unconstitutional under that standard, and that the Department will no longer defend Section 3. At the same time, notwithstanding President Obama's determination that Section 3 is unconstitutional and shouldn't be defended in court, President Obama has instructed executive-branch agencies to continue to comply with, and enforce, Section 3.

III

Attorney General Holder's explanation of the Obama administration's supposed legal reasons for abandoning defense of DOMA's Section 3 cannot be taken seriously on its own terms.

Most starkly, the Attorney General's claim to be acting consistent with the Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense" is clearly wrong. Attorney General Holder can make that claim only by mistakenly asserting—without citing any supporting authority—that the "reasonable" threshold requires some undefined quantum of force beyond what "plausible" or "professionally responsible" arguments provide. That assertion does *not* accurately describe the Department's longstanding practice across different presidential administrations, as my discussion above shows.

In my judgment, there are compelling arguments in support of the constitutionality of Section 3 of DOMA—arguments that ought ultimately to prevail in court. But for present purposes I will limit myself to the far more modest proposition that there are plenty of reasonable arguments that any competent lawyer could develop in defense of Section 3 in those few jurisdictions that haven't yet ruled that sexual-orientation classifications are subject to rational-basis review. Among the available arguments (which I will only summarize at a high level of generality here):

(1) The Supreme Court's jurisdictional dismissal of the appeal in *Baker v. Nelson* (1972) for want of a substantial federal question is binding precedent for the proposition that limiting marriage to a man and a woman does not violate equal-protection principles.[8]

[8] Before it succumbed to political pressure and reversed course (see Part IV), the Department of Justice in the Obama administration made this argument in its opening brief in support of its motion to dismiss in *Smelt v. United States*, No. 09-286 (C.D. Cal. June 11, 2009).

(2) Section 3 does not in fact classify on the basis of sexual orientation.[9]

(3) Whatever weight is to be accorded the four factors that "should inform" the decision whether heightened scrutiny should apply can't possibly offset the fact that traditional marriage laws were universal at the time that the Constitution was adopted as well as when the Fourteenth Amendment was ratified (and that, with only a handful of recent exceptions, marriage has always been understood in every civilized society as limited to opposite-sex unions).[10]

(4) All eleven federal circuit courts to address the question have determined that classifications based on sexual orientation are subject to rational-basis review.[11]

(5) Consideration of the four factors that "should inform" the decision whether heightened scrutiny should apply doesn't support heightened scrutiny for classifications based on sexual orientation. Among other things, there is no scientific consensus on what even constitutes sexual orientation; sexual orientation is not an observable characteristic; gays and lesbians are not politically powerless; and, far from being a characteristic that is immutable at birth, there is no established understanding of the origins of sexual orientation and there is ample empirical evidence that sexual orientation can shift over time and does shift for a significant number of individuals.[12]

(6) Even if heightened scrutiny were to apply, the level of increased scrutiny should be very modest.

(7) The same interests that would readily satisfy rational-basis review of Section 3—including the interests in supporting traditional marriage as the best vehicle for responsible procreation and childrearing[13]—would also suffice to satisfy any heightened standard of scrutiny.

By contrast, the Administration's argument for the proposition that Section 3 is unconstitutional is remarkably feeble and certainly comes nowhere close to establishing that Section 3 is "so patently unconstitutional" that it shouldn't be defended under the

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[9] Here too, before it succumbed to political pressure and reversed course (see Part IV), the Department of Justice in the Obama administration made this argument in its opening brief in support of its motion to dismiss in *Smelt v. United States*, No. 09-286 (C.D. Cal. June 11, 2009).

[10] See Defendant-Intervenors-Appellants' Opening Brief, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Sept. 17, 2010), at 51-60.

[11] See id. at 70-71.

[12] See id. at 70-75.

[13] See id. at 77-93.

Department's longstanding practice. Attorney General Holder does not even present a complete argument: With very little intermediate reasoning, he bounces from the (highly contestable) assertion that the four factors that "should inform" the decision on level of scrutiny "all counsel[] in favor of being suspicious of classifications based on sexual orientation" to the statement that "[a]fter careful consideration, … the President has concluded that *given a number of factors*, including a documented history of discrimination, classifications based on sexual orientation should be subjected to a heightened standard of scrutiny." (Emphasis added.) What assessment did President Obama make of each of these factors? What weight did he give to them? How did he consider them in conjunction with other information that "should inform" a legal judgment? Attorney General Holder says nothing directly about President Obama's thinking on any of these matters. Even if the reader were to assume that President Obama assessed the four factors in the same way that Attorney General Holder did, Attorney General Holder's own assessment is far too sketchy and conclusory to amount to a coherent, much less a persuasive, legal argument.

President Obama's determination that Section 3 fails to meet heightened scrutiny is equally conclusory. Again, even if the reader were to assume what is not stated—that President Obama's analysis on all points was identical to the Attorney General's—Attorney General Holder's own conclusion rests on cherrypicking snippets from the legislative record of DOMA's enactment and then tendentiously construing those snippets. There is no sign that it rests on a careful consideration of all relevant evidence and information. Further, in a brazen bit of bootstrapping, Attorney General Holder dismisses the public interest in the connection between traditional marriage and

"procreational responsibility" because the Department has already (wrongly) disavowed that interest as unreasonable.

One advantage that President Obama might find in keeping as opaque as possible the reasoning underlying his conclusion that Section 3 of DOMA is unconstitutional is that that same reasoning would surely dictate a similar conclusion that traditional marriage laws are also unconstitutional. But President Obama won election to his office maintaining that he opposed same-sex marriage[14] (and keeping contrary evidence buried until it was too late[15]), and his supposed position in support of traditional marriage laws necessarily conveyed his belief that traditional marriage laws are constitutionally permissible. Indeed, that implication was particularly compelling given that he had taught constitutional law, including equal-protection issues, for years. Nothing in the Supreme Court's constitutional landscape on the issue of same-sex marriage has changed since the 2008 election, so President Obama would have some considerable difficulty explaining how his constitutional thinking has flipped. And he might prefer not to give millions and millions of American voters ample cause to believe that he had bamboozled them on this fundamental question.

It is also noteworthy that President Obama does not have the courage of his supposed convictions about Section 3 of DOMA. If he genuinely believed that Section 3 is clearly unconstitutional, why would he continue to direct executive-branch officials to enforce it? One legal commentator offers this compelling explanation: President Obama

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[14] See, e.g., "Barack Obama Answers Your Questions About Gay Marriage, Paying For College, More," MTV, Nov. 1, 2008 ("I believe marriage is between a man and a woman. I am not in favor of gay marriage."), *available at* www.mtv.com/news/articles/1598407/did-barack-obama-answer-your-question.jhtml.

[15] See "Obama changed views on gay marriage," *Windy City Times*, Jan. 14, 2009, at 6 (disclosing Obama's signed statement from 1996 that "I favor legalizing same-sex marriages, and would fight efforts to prohibit such marriages"), *available at* www.politico.com/static/PPM110_wct_20090114_obama.html.

"is the 'un-Lincoln.'" Whereas Abraham Lincoln compellingly explained the defects of the Supreme Court's notorious *Dred Scott* ruling and declared that the executive branch under his direction would not abide by the mistaken principles set forth in that ruling, Barack Obama embraces the notion that the Constitution means whatever five justices say that it means. President Obama "would rather hint, and wheedle, and pine for an eventual Supreme Court ruling in favor of same-sex marriage," for he is "the Court's courtier, surrendering the dignity of his office, and the legislative power of Congress, to a hope that the Supreme Court too will 'evolve' in its view, change the effective meaning of the Constitution, and foist same-sex marriage on the American people with an authority more difficult to challenge than that of a mere president"[16]—much less of a president who was elected to office while prominently claiming to oppose same-sex marriage.

IV

For all its flaws, the Obama administration's decision to abandon its formal defense of DOMA has the modest virtue of making overt a far greater scandal that the Obama administration has been attempting to obscure: namely, that the Department of Justice has only been pretending to defend DOMA but in fact has been actively sabotaging it.

Here is the overarching narrative (a similar version of which could be recounted for the Department's deliberate mishandling of "Don't Ask, Don't Tell" litigation[17]):

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[16] Matthew J. Franck, "Obama, DOMA, and Constitutional Responsibility," *Public Discourse*, March 1, 2011, *available at* www.thepublicdiscourse.com/2011/03/2827.

[17] See Edward Whelan, "Don't Defend, Don't Tell," *Public Discourse*, Oct. 15, 2010, *available at* http://www.thepublicdiscourse.com/2010/10/1836.

1. On June 11, 2009, in *Smelt v. United States*, No. 09-286 (C.D. Cal.), the Department of Justice in the Obama administration filed its first brief in defense of DOMA. In straightforward and unremarkable legal prose, that brief argued that the claim of plaintiffs, "a same-sex couple married under the laws of California," that DOMA is unconstitutional should fail for various reasons.

2. The Obama administration's opening brief in *Smelt* elicited a firestorm of opposition and outrage from gay and lesbian groups. As one gay publication put it (in an article titled "Gay Blogosphere Erupts Over Obama's DOMA Defense"[18]), "The gay blogosphere lit up like a firecraker [*sic*] Friday on news that the Obama administration was defending the Defense of Marriage Act … in a federal lawsuit." One "[p]rominent blogger" called the brief "despicable, and gratuitously homophobic"—among other things, because he somehow found it objectionable that "the brief argued that DOMA is reasonable…, is constitutional …, [and] wasn't motivated by any anti-gay animus." Another labeled President Obama "the homophobe in chief." The head of the Human Rights Campaign wrote President Obama a letter stating that "this brief would not have seen the light of day if someone in your administration who truly recognized our humanity and equality had weighed in with you." And much, much more evidently went on behind the scenes in meetings between the Administration and gay and lesbian advocates.

3. In a stark demonstration of the power of a purportedly powerless group, the Department sharply altered the course of its advocacy. In its reply brief in *Smelt*, filed on August 17, 2009, the Department prominently stated (p. 2 (emphasis added)):

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[18] *Available at* http://www.ontopmag.com/article.aspx?id=4002&MediaType=1&Category=26.

> With respect to the merits, this Administration does not support DOMA as a matter of policy, *believes that it is discriminatory*, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.

This halfhearted advocacy contradicts the promises made in confirmation testimony by the Department's political leaders. As a typical example, then-Solicitor General nominee Elena Kagan testified at her confirmation hearing that the "critical responsibilities" that the Solicitor General owes to Congress include "most notably the vigorous defense of the statutes of this country against constitutional attack."[19] She made clear the obvious point that an effective advocate must give the impression that he believes his own arguments, whether or not he actually does.[20]

It gets much worse. In that same reply brief (pp. 6-7), the Department gratuitously repudiated grounds for defending DOMA, as it asserted that "the United States does not believe that DOMA is rationally related to any legitimate interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA's constitutionality." Never mind that these grounds had proven *successful* in previous

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[19] As for the situation in which the policy of a new Administration might differ from that of a previous Administration, Kagan declared (in response to a written question):

> The cases in which a change between Administrations is least justified are those in which the Solicitor General is defending a federal statute. Here interests in continuity and stability combine with the usual strong presumption in favor of defending statutes to produce *a situation in which a change should almost never be made*. [Emphasis added.]

[20] As Kagan put it, "I know that [former Solicitor General] Ted Olson would not have voted for the McCain-Feingold bill, but he … did an extraordinary job of defending that piece of legislation…. And that's what a solicitor general does." In response to then-Senator Feingold's joking observation that "I could have sworn he almost was believing what he was saying," Kagan replied: "For that day he was persuaded, and that's all you need."

litigation against DOMA[21] (as well as in challenges to traditional marriage laws). And never mind that, as the Department's opening brief had pointed out, the "United States," in the form of a report of the House Judiciary Committee, had invoked these very interests when Congress enacted DOMA.

A proponent of same-sex marriage promptly celebrated the Department's reply brief with these apt observations (emphasis added):

> *This new position is a gift to the gay-marriage movement, since it was not necessary to support the government's position.* It will be cited by litigants in state and federal litigation, and will no doubt make its way into judicial opinions. *Indeed, some state court decisions have relied very heavily on procreation and child-rearing rationales to reject SSM [same-sex marriage] claims. The DOJ is helping knock out a leg from under the opposition to gay marriage.*[22]

4. Thereafter (and up until its outright abandonment of DOMA), the Department took this same position in every DOMA case, and ultimately engineered the desired result. In *Gill v. OPM* (D. Mass. Jul. 8, 2010), the lone judge to rule against DOMA noted that "the government has disavowed Congress's stated justifications" for DOMA and stated that he would therefore address them "only briefly": "This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA."

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[21] See *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005) ("Because procreation is necessary to perpetuate mankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government."), *reversed on standing grounds*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (applying Eleventh Circuit precedent that "encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest"); *In re Kandu*, 315 Bankr. R. 123, 146 (2004) (applying authorities recognizing that "the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern").

[22] Dale Carpenter, "DOJ Boosts the Cause of SSM," Aug. 17, 2009, *available at* volokh.com/archives/archive_2009_08_16-2009_08_22.shtml#1250541892.

5. In November 2010, Assistant Attorney General Tony West, the head of the Department's Civil Division, told a group of liberal bloggers that it was "difficult" for the Obama administration to defend DOMA (and "Don't Ask, Don't Tell"). West admitted that the Department was modifying and diluting its legal arguments in DOMA cases to comport with the Obama administration's "policy values." As one sympathetic account[23] put it (emphasis added):

> West said Monday that DOJ was discharging its responsibility to the tradition of the Justice Department while making adjustments to the arguments in line with the administration's views.
>
> "I think that the best example -- let me give you one -- in the Defense of Marriage Act -- you'll notice that we have not only discharged our responsibility to defend the constitutionality of a congressional statute, but *we've done so in a way which reflects the policy values of this administration*," West said.
>
> "We disavowed some arguments that we believed had no basis in fact, and in fact we presented the court through our briefs with information which seemed to undermine some of the previous rationales that have been used [in] defense of that statute," West added.

According to the same account (emphasis added), West further revealed that the Civil Division "has worked with the Civil Rights Division's liaison to the gay, lesbian, bisexual and transgender community to *make sure that future briefings don't advance arguments that they would find offensive*." In other words, West was conceding that the Department was allowing the sensitivities of a favored political constituency to have extraordinary influence over how the Department defended, or pretended to defend, DOMA.

[23] *Available at* http://tpmmuckraker.talkingpointsmemo.com/2010/11/doj_official_defending_dadt_doma_difficult_for_administration.php.

In sum, far from providing the vigorous defense of DOMA that it promised, the Obama administration undermined that litigation for the obvious purpose of pleasing a powerful and favored political constituency.

V

I will close with a few final observations about the decision by the House of Representatives to retain counsel to defend DOMA:

1. That decision is fully warranted and should be supported, as a matter of principle, by all House members, whether or not they support DOMA. For the reasons explained by former Clinton administration Solicitor General Drew Days, the Obama administration should not be rewarded for failing to afford Congress and its enactments the respect to which they are entitled and it should not be permitted to use litigation "as a form of post-enactment veto of legislation that [it] dislikes."

Anyone unclear on the principle at stake should ponder the prospect of a Republican president, elected in 2012, who decides to abandon defense of constitutional challenges to the Patient Protection and Affordable Care Act of 2010 (aka ObamaCare).

2. The Department should be encouraged or compelled to undo as much as possible the damage that it has done to defense of DOMA. That means, among other things, that the Department should agree in its briefs that the House of Representatives should not be foreclosed from asserting the justifications for DOMA on which the House relied when DOMA was enacted, including that DOMA serves weighty public interests in responsible procreation and child-rearing. That means, also, that the Department should take all necessary steps, along the lines outlined by Walter Dellinger, to ensure that proceedings are not dismissed for lack of adverseness between the parties.

3. The Department's irresponsible course of action is fully to blame for the House's need to incur legal fees in defending DOMA. Thus, although it is refreshing to witness concerns of fiscal frugality from some members of the House not ordinarily associated with such concerns, those concerns are misdirected if they are deployed to question or oppose the House's retention of counsel. The far more sensible course is for the House to make clear that the sum to be appropriated for the Department will be reduced by the sum expended on legal fees in defense of DOMA—or, better yet, by some healthy multiple of that sum.

Mr. FRANKS. There were questions earlier as to why the Department was not invited here. Just for the record, the Department did write a letter to us outlining their position, and we used that as a basis for that. The minority had the opportunity, if they chose, to choose a witness from the Department if they felt like further clarification beyond the letter was significant. And I just wanted to put that on the record.

I will now begin my question—the questioning by recognizing myself for 5 minutes.

Mr. Whelan, the President has a constitutional obligation to "take care that the laws are faithfully executed." And he swears an oath to faithfully execute his office. Do these constitutional obligations, in your mind, require that decisions not to defend a law must be based on sincere legal analysis rather than a political calculation?

Mr. WHELAN. Absolutely. And further, they require that that legal analysis, not only that it be sincere, but be very carefully considered and responsible.

Again, the point I would emphasize here is that putting aside questions of constitutional authority, the very basis on which Attorney General Holder has attempted to defend this action, the notion that this is consistent with the standard of defending any time there are reasonable arguments to be offered; in fact, it is clear that is not the case here.

Mr. FRANKS. So I guess the follow-up question is do you believe the President's actions meet the Constitution's faithfulness standard?

Mr. WHELAN. No, I don't.

Mr. FRANKS. Do you view the present Administration's actions in the DOMA litigation as an improper politicization of the Justice Department?

Mr. WHELAN. I do. And again, as I have outlined and detailed more extensively in my written testimony, I think we see the whole track record of undermining this litigation, as well as the Don't Ask, Don't Tell litigation, which I have addressed in separate writings.

Mr. FRANKS. Ms. Gallagher, virtually every known society, as you mentioned in your testimony, since the beginning of history has had some form of marriage. There have been some cultural differences in the meaning of marriage among various societies, but what elements of marriage have been universal?

Ms. GALLAGHER. Would you forgive me if I just made a brief remark on the politicization thing and then answer your question?

Mr. FRANKS. Certainly.

Ms. GALLAGHER. Thank you.

For me, the context of this last decision to refuse to defend DOMA, you have to look at the history of this. When DOMA was first challenged in the first circuit, a career Justice Department lawyer submitted a brief in that case similar to the briefs that had won in other litigations. There was a huge outcry from an important member of President Obama's political base. That brief was publicly withdrawn, and then a new brief repudiating the purposes of DOMA was resubmitted.

And so I just wanted to add that, in addition to—when you are evaluating President Obama's Justice Department's decision now on whether it is politicization, I think you have to see it in the context of the very public way in which the Justice Department's actions were publicly politicized. Its legal strategies were shifted in response to politically expressed outrage.

And now I will let lawyers handle those questions.

There is a basic shape to marriage in virtually every known human society, and it varies a lot. It is not unchanging. But it is always a public union, not just a private personal and intimate union; it is a sexual union, it is not some other kind of union, in which the rights and responsibilities—between a man and a woman, I should say. At least between one man and one woman. Because polygamy is, frankly, fairly common in—especially in small tribal societies, in which the rights and the responsibilities of the man and the woman toward each other and toward the children their sexual unions naturally produce are publicly defined and supported, which means we don't the just leave it up to a bunch of adolescents in the middle of their psychological dramas to figure out on their own what this whole big dimension of human experience means.

Virtually every society has recognized you need a public institution that is dedicated to the idea that children need a father as well as a mother, and that, you know, brings the two sexes together into a union that protects the children that their bodies make together.

Mr. FRANKS. So do you agree or disagree with the Massachusetts Supreme Court's holding that government creates marriage?

Ms. GALLAGHER. The very worst part of the Goodrich decision is the one line—well, there are a lot of parts I disagree with, but it is the line that essentially what we have here is a licensing scheme, right? As if the Legislature of Massachusetts just sat around and dreamed up this idea called marriage.

I think that government has a role in recognizing marriage because it is so important to the common good, but I do not believe that government invented marriage and has the right to redefine it, a moral right.

Mr. FRANKS. Well, thank you, Ms. Gallagher.

I guess I am about to lose my time here, so I will now recognize Mr. Nadler.

Mr. NADLER. Thank you.

Ms. Gallagher, how would you explain to children like McKinley and Brianna, who are here with us with their parents today, that their family is not deserving and should be excluded from the protections and benefits of marriage, including the important confirmation that the Federal Government considers them a family? Would you consider these children expendable?

Ms. GALLAGHER. I think no children is expendable. And, by the way, this is a question that has been answered about the ideal of marriage. Gay people have families that are not marital families, but they are families. I myself was an unwed mother, so I have firsthand experience with being in a family that is not a marital family.

I don't think that you need to have a message of stigmatization and exclusion to protect an ideal which is important to the whole of society.

Mr. NADLER. That is the whole point of DOMA, to stigmatize and exclude.

Ms. GALLAGHER. Well, that is your opinion, with all due respect. It is not my opinion, nor, I think, what was expressed by Congress in 1996 or by——

Mr. NADLER. Excuse me. I have the time. How does excluding these people help protect marriage?

Ms. GALLAGHER. Well, the way that I think that the majority of Americans who disagree with you understand it is that these are not marriages. So it does not make sense because——

Mr. NADLER. I didn't ask that question. I asked, how does excluding these people from marriage help protect heterosexual marriages?

Ms. GALLAGHER. Because including same-sex unions as marriages denies at a public level that marriage is about, in an important way, bringing together mothers and fathers for children.

Secondarily, it is based on the idea that it is immoral and abhorrent to have a——

Mr. NADLER. In other words, we need to exclude——

Ms. GALLAGHER.—dedicated to bring around——

Mr. NADLER. In other words—excuse me.

Ms. GALLAGHER. I am trying to answer the question.

Mr. NADLER. Yes. But you are answering it at length greater. I only have 5 minutes.

Ms. GALLAGHER. I apologize.

Mr. NADLER. Now, you spoke exhaustively about a supposed politicization of the Justice Department under this Administration. Your organization, which is based in New Jersey, spent nearly $650,000 on a campaign to unseat Iowa Supreme Court Justices because of their decision that gay and lesbian couples should be able to marry in Iowa.

Do you think that judges should decide cases based on political concerns or they fear for their jobs? And, if so, how does the judicial branch differ from the legislative branch? And what is the purpose of the legal protection clause?

Ms. GALLAGHER. The National Organization for Marriage is a political advocacy organization, so I think it is appropriate for us to be politically involved in a way that the Department of Justice is not supposed to be politicized.

Mr. NADLER. No. But are judges supposed to decide cases on that basis?

Ms. GALLAGHER. Secondly, I think there is an argument about whether judicial elections are a good idea. But what I don't think you can say to the people of Iowa is if—you have an election for judges, but you are not allowed to vote no because you disagree with their decision on——

Mr. NADLER. So you think judges should be in a position where they have to take into account the popularity, not just the justice, of what they are about to decide.

Ms. GALLAGHER. Well, I think there is an argument about whether judicial elections are a good idea, and I have not expressed—I don't actually have a informed opinion on that. But I do believe——

Mr. NADLER. Thank you.

Professor Ball, would you comment on Mr. Whelan's comments on the lack of any legal justification for the Department of Justice's decision on defending section 3 of DOMA?

Mr. BALL. Yes. I completely disagree.

Mr. NADLER. Could you turn on the mike, please?

Mr. BALL. It is on on. I am sorry, it is probably not close enough to my mouth.

I completely disagree with that characterization. It seems to me that the Obama administration has done a careful and thorough job looking at the arguments in favor of DOMA, and they have decided that, in fact, there is no rational reason to deny couples who are already married under their State laws of the hundreds and hundreds of Federal benefits that are based on marriage.

It is important in understanding the Obama administration's decision that marriage, family law, domestic relations, has always been a matter of State jurisdiction. So in that context I think the Obama administration's decision here is the correct one.

Mr. NADLER. Thank you.

And finally, what is your response to Mr. Whelan's claims that all 11 Federal circuits that have addressed the question have determined that rational basis review is the proper basis to apply to laws that discriminate against gay men and lesbians?

Mr. BALL. Well, I can see that in the 1980's and 1990's, there were a handful of circuit courts relying on *Bowers v. Hardwick*, which is no longer a good law——

Mr. NADLER. No longer good law because it was explicitly overruled by the Supreme Court.

Mr. BALL. Exactly. Correct.

They did conclude that lesbians and gay men's sexual orientation classifications were not entitled to heightened scrutiny.

What has happened, of course, as you mentioned, is that that case has been overturned, and what we have had in the last few years is some circuits citing to those old cases whose legal reasoning is no longer valid without engaging in the appropriate analysis of whether a particular classification merits a heightened scrutiny. So I disagree with that legal conclusion.

Mr. NADLER. And you would say that in light of *Romer v. Evans* and in light of *Lawrence*, two Supreme Court cases, that courts would be compelled to decide that there is a heightened scrutiny requirement?

Mr. BALL. Absolutely. I mean, because of *Romer*, because of *Lawrence*, because of the long history of discrimination, because of the fact that sexual orientation has nothing to do with the ability of individuals to contribute to society, which make therefore suspect government classifications based on sexual orientation.

Mr. NADLER. Thank you. I yield back.

Mr. FRANKS. Thank you, Mr. Nadler.

I hope we can be as respectful to the witnesses as we possibly can.

Mr. Conyers, I will recognize you, sir, for 5 minutes.

Mr. CONYERS. Thank you very much.

Was Mr. Nadler correct when he said your organization raised sums of money against judges in more than one State?

Ms. GALLAGHER. I believe the only judicial election we were involved with was last November's in Iowa, where for the first time in history the people of Iowa voted down all three judges who were up for judicial retention election, yes. And I am under oath, so I don't know if it was 600,000 or 650,000, but it was on that order of expense we spent in media, informing the voters that these judges had voted for gay marriage, yes.

Mr. CONYERS. What about in Maine, your organization in Maine?

Ms. GALLAGHER. We were not involved in judicial retention elections in Maine. We have been politically involved in a number of States.

Mr. CONYERS. I am talking about repealing a law allowing gay and lesbian couples to marry.

Ms. GALLAGHER. Yes, we were responsible for getting Prop 8 only the ballot and were probably the lead organization in the Maine case.

Mr. CONYERS. And is it true that your organization may have spent $1.9 million in that campaign?

Ms. GALLAGHER. I don't have those figures in front of me, but we certainly were involved. That is probably on the order of correct again. I didn't really come prepared to testify in detail on those questions, but that is—I am sure that if that is what you are told, it is on that order.

Mr. CONYERS. That is a lot of money.

Ms. GALLAGHER. Well, last year we raised and spent $13 million, to the best of my recollection. So in 3 years we have grown from zero to that. We have 50,000 donors and about 800,000 people actively involved.

Mr. CONYERS. So you plan to raise even more money. It keeps getting larger and larger?

Ms. GALLAGHER. Well, until we win the fight to protect marriage as one man and one woman, we will try to raise as much money as we can. It will be a long time until we are as big as the Human Rights Campaign, but that is our goal.

Mr. CONYERS. Well, if, as you contend, the will of the people on this issue is so clear, why do you have to raise more and more amounts of money?

Ms. GALLAGHER. Well, do I really have to explain to a Congressman that it is important to raise money to get your message out? I think that is the way politics works. One of the reasons I founded the National Organization for Marriage is that I realized that social conservatives—and not everybody who agrees with us would call themselves a social conservative—but that we relied too much on spontaneous mass uprisings of the people, and that, in fact, you know, we needed to be politically organized.

I have to say, I learned a lot by watching how effective the gay rights political organizations are about what needed to be done if we are going to have two teams on the field on this issue.

Mr. CONYERS. Well, I can see why you were invited here. I still am going to consult with the Chairman of the Committee about the letter that is now contended that we should have invited the Attor-

ney General if we wanted him so badly, but yet we are going to have the Attorney General next month after we have gone through all of this.

Mr. Whelan, you said that this was obviously politically motivated by the President, by his conduct in not defending these cases. Are you aware that he campaigned against DOMA even before he was elected President?

Mr. WHELAN. I am aware that he has taken the position——

Mr. CONYERS. I said you are aware of that, aren't you?

Mr. WHELAN. As a matter of policy, yes.

Mr. CONYERS. All right. And that the issue that we have been really going over here today is not about whether he was going to—whether he is for it or against it. The issue is whether the Department of Justice should defend the case. Isn't that what really the finer issue is about?

Mr. WHELAN. Whether the Department will abide by its longstanding practice of vigorously defending Federal laws for which reasonable defenses may be offered, yes.

Mr. CONYERS. Well, what about all of the Bush-era decisions of which we are told it is several hundred, some have said as high as 750, in which he declared laws that he was signing were unconstitutional, and he wasn't going to enforce them? Has that ever come to your attention as a scholar?

Mr. WHELAN. Absolutely, and indeed I addressed that in my testimony. And as I make clear, the source of the President's authority to decline to defend a Federal law is exactly the same as the source of his authority to issue constitutional signing statements, a practice that President Obama, over no one's objection, has continued. The question is whether in any particular instance the exercise of that authority is sound or not.

Mr. CONYERS. Well, you mean sound in terms of whether you agree with it or not?

Mr. WHELAN. I mean sound in terms of good constitutional judgment, sound—and I mean—in particular here, I mean sound in terms of the rationale that the Administration has offered.

Mr. CONYERS. The President, sir, not only is a lawyer, but he taught constitutional law. He was a United States Senator. And I am sure your opinion about what is sound or not is as good as anybody else's, including mine, but why do we have to gather here today to question whether it is sound or not? It is going to be tested in the courts, as you well know.

Mr. WHELAN. Well, the fact that President Obama has the strong background that you identify in constitutional law makes it all the more implausible to think that suddenly he has discovered simply because a case has been filed in the Second Circuit, that his understanding, his longstanding understanding, that DOMA was constitutionally permissible but bad policy was wrong, and indeed that DOMA and marriage laws throughout the country are somehow unconstitutional. It simply isn't plausible that——

Mr. CONYERS. What is so implausible about it?

Mr. WHELAN. The filing of a case, the filing of two cases in the Second Circuit, that triggers this complete 180-degree turn and Barack Obama's understanding of the constitutional status of same-sex marriage? As I document in detail in my testimony, I

think one would have to be very naive to think that it is anything other than a stealth strategy of step by step by step the Administration is doing whatever it can to promote same-sex marriage and to induce the courts to adopt that approach.

Mr. CONYERS. I am totally confounded by you and I admit that he is a good lawyer, he was a Senator, he is a law school scholar, he has taught law, and now you say it is perfectly naive to think that there was anything other than a political motive for him to do what he did.

Mr. WHELAN. Let me put it this way——

Mr. CONYERS. Wait a minute——

Mr. WHELAN. May I respond to that?

Mr. CONYERS. Just a moment. Yes, I should let you do that.

Mr. WHELAN. The matter would have been quite different if President Obama when running for President had said, I believe there is a constitutional right to same-sex marriage. I believe that the Defense of Marriage Act is unconstitutional. It would have been entirely different if from the outset the Department of Justice, rather than pretending to defend these cases, had said, we are not going to have anything to do with them. We are following what our President says. We are going to let other people step in and offer an effective defense.

Instead they pretended to defend them, undermining those cases in the process. That whole course of conduct, more than this particular decision in February, is the real scandal.

Mr. FRANKS. Mr. Conyers, I think they are going to call a vote here pretty quickly, so I want to try, if we can——

Mr. CONYERS. Thank you for your generosity and the time, Mr. Chairman. I yield back.

Mr. FRANKS. I would now quickly, related to political fund raising, I am understanding Mr. Obama intends to raise about $1 billion this next time, and if he is convinced that he has got the will of the people, perhaps he should just forego that.

Mr. Scott, you are recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Ball, does DOMA prohibit gay marriage in States if States want to do it?

Mr. BALL. Absolutely not.

Mr. SCOTT. Does it deny gay couples the right to have or raise children?

Mr. BALL. No, it does not.

Mr. SCOTT. If the State recognition of gay marriages in other States, if the full faith and credit clause of the Constitution doesn't require it, what is the effect of the law?

Mr. BALL. If the Constitution doesn't require it, then that part of DOMA—are you referring to section 2, Mr. Congressman?

Mr. SCOTT. The part that allows the States not to recognize an out-of-State gay marriage.

Mr. BALL. Yes. You know, the issue of whether or not a marriage recognized in one State is constitutionally—that there is a constitutional obligation to recognize that marriage, it is a complicated one, and what exactly the statute adds to that is not entirely clear, but I think——

Mr. SCOTT. Because if it has to recognize that the statute is unconstitutional and meaningless, if it doesn't require it, then it wasn't needed to begin with.

Mr. BALL. That is correct. It is part of the problem with DOMA, that it was never needed to begin with. Neither section 2 nor section 3 were needed.

Mr. SCOTT. Ms. Gallagher, you started to mention something about antimiscegenation laws. I know Virginia was the case in *Loving v. Virginia*. We had a law since 1691. Sixteen other States had laws that were overturned by the by the *Loving* case.

We have heard a lot about letting the democratic process deal with this, but it was those, I think they are they are called lifetime activist liberal Federal judges violating the will of the people overturned those laws. Was that a good idea to allow those judges to impose their will on the people, or should we have relied on the democratic process to change those laws?

Ms. GALLAGHER. I believe that the constitutional protections for race are extremely important, are properly enforced by the courts. In fact, it took an entire Civil War in which 600,000 people died in order to get the equal protection clause, which specifically refers and clearly forbids racial classifications.

Mr. SCOTT. So it was a good idea to override the will of the people in that case and not to allow the judicial process to consider gay marriages?

Ms. GALLAGHER. Well, I have never argued that people don't have a right to litigate. I think that that is a basic civil right. But what I have argued is that the traditional understanding of marriage is the union of husband and wife is not at all akin to interracial marriage and should not be treated by the courts in the same way.

Mr. SCOTT. Well, since 1691, the definition of marriage in Virginia, my home State, was that it could not include Blacks and Whites.

Ms. GALLAGHER. And we totally agree about that, that that was a good thing to do. What we are disagreeing about is whether there is any analogy to be drawn between interracial marriage and defining marriage as the union of husband and wife, and we probably just substantively disagree about that.

I raised it in the context of pointing out if you really believe that, that people who think like me and the millions of Americans who think like me, that we are like bigots who opposed interracial marriage, the government is going to intervene very strongly to affect those people's lives in areas from professional licenses, the tax-exempt status of organizations.

We are already seeing, in fact, the beginnings of the impact on individuals who belong to traditional-faith communities of the idea that these views are akin to racial bigotry. I have seen people losing their jobs. I have seen licenses threatened. We are seeing people kicked out of graduate school programs. And, you know, I have a serious concern that there are people who really do believe it is like interracial marriage and that the government and the courts——

Mr. SCOTT. Well, Ms. Gallagher, remind me what churches were saying about interracial marriages before 1967.

Ms. GALLAGHER. Well, actually, I am a Roman Catholic, and I would argue that the dominant Christian tradition, as practiced not only in the United States but across centuries in history, that there is no grounding for that as a deep Christian idea. But certainly people made arguments from the Bible. You know, the devil can quote Scripture for his own purposes. There is no question about that.

Mr. SCOTT. Are you telling me the churches in Virginia——

Ms. GALLAGHER. You are stretching my knowledge to go back to the churches in Virginia in the 18th and 19th century. But certainly having looked at it, it is quite probable that there were churches that made that argument.

Mr. SCOTT. My time has expired. I just want to remind people what Professor Ball pointed out, that failure to recognize other States' unions gets you into all kinds of problems with estate tax, real estate and other things that actually make no sense. And I thank him for bringing that up.

I yield back.

Mr. FRANKS. Thank you, Mr. Scott.

I now recognize Mr. Quigley for 5 minutes.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Mr. Chairman, you are right, we should treat our witnesses with respect. This is a very passionate issue, and sometimes that makes it difficult for folks to talk. We talk past each other. The law has been talked about a lot here, and it becomes an emotional issue.

So I haven't done this yet, but, you know, for me, the issue of how this relates to parenthood has been paramount. This Sunday my youngest turns 21, and my kids have been different and different challenges, as every parent can say. I would like to think I have been a good parent. Only time will tell. My parents probably felt the same way. So I am no expert on it.

But wouldn't you agree it is such a personal issue? It is so close. For those who want government to stay out of people's lives, what could be more personal than the decision on who you should love or can love and how to express that love in raising children?

You have seen the commercials about adoption. They say you don't have to be perfect to be a parent. It has nothing to do with orientation, but you get the flavor of it. I am not perfect. You talk about as it relates to being able to procreate, stability, that you need a father as well. You recognize that it is probably the minority of straight couples have that kind of situation right now, but we don't tell those folks that they can't be married, or, if that is the end of it, they can't.

I will let you go. If it is just a personal thing, and I actually think that hinges a lot of public opinion, I am no expert, but I think it has more to do with whether or not I was a good parent, or you or anybody else here, more to do with being willing to wipe noses, deal with skinned knees, teach how to ride a bike, teach how to read, be patient, loving, pretend to know something about girls' fashion. You get a sense of that.

I don't think in the moments of being a parent that you are thinking what your orientation is, and I sure as heck don't think your kids do either.

Ms. GALLAGHER. You know, we would agree on so much if we weren't in a hotly contested political arena where it is not—somehow it is not in anyone's interest to agree.

Mr. QUIGLEY. I just want this one time we don't talk past each other.

Ms. GALLAGHER. I honestly believe 90 percent of what you said. I believe there are gay people who are wonderful parents. And it is interesting to me that no matter how I try to avoid it, that people interpret what I say as a condemnation of gay people and their parenting skills, because that is not my intent.

What I really do believe, however, is that we have an enormous problem in this country. It wasn't caused by gay people, and it can't be cured by them, but it is entirely about how serious we are, not about marriage as an expression of romantic love, which is doing fine in Hollywood, right, but whether marriage as a social institution is going to fulfill its role of bringing together mothers and fathers and keeping them together in the same loving family for the sake of the children.

And I wish I believed, as you do apparently, that same-sex marriage is just going to be about including a few more people in the same institution. What I really do believe is that the founding ideas driving the social institution have big consequences, and the heart of the gay marriage idea is that if you think it is ideal for a child to have a mother and father and that marriage is about this, there is something wrong with you, you are being mean to gay people. That may not be your view, but it is the dominant idea expressed now.

If you just go out in the public square and you say—this happened to me in Maine. I was on a radio show, and I said, well, you know, marriage deserves its unique status because children need a mother and father. And the host turned to me and said, I cannot believe I am hearing such hatred and bigotry.

You know, I understand that some people hear it that way. It saddens me. But it also persuades me that we are in a real fundamental question about what marriage is supposed to mean.

Mr. QUIGLEY. But if your concern is to defend marriage, don't you see greater threats being infidelity, domestic violence, alcoholism, drug use? Those are the things that drive families apart.

Ms. GALLAGHER. I spent about 20 years in the family fragmentation debate, working on the issues of divorce and unmarried childbearing, and I still actually devote some of my time to that. But I do see a need. I wouldn't say—if I could wave a magic wand and eliminate divorce and have gay marriage, I might wave that magic wand. But that is not the way it works.

You know, just as in the 1970's when I was a child, I was told that the no-fault divorce revolution wouldn't affect marriage because it would only affect bad marriages. And I think that turned out to be wrong. I think it affected everyone's marriages by changing the sense that marriage is a permanent commitment. And in the same way, I think same-sex marriage is going to eventually affect everyone's marriage, not mine because I am old, but by changing the public understanding of what this institution is and what it is for, and by branding people who hold my views of marriage, which, again, are very powerfully related to its role in protecting

children by regulating family structure—by branding people like us as motivated by animus and hatred, and it is going to be hard to sustain that idea if the law adopts that point of view toward the people who hold it.

Mr. QUIGLEY. Thank you, Mr. Chairman.

I guess what divides us is that this is a very personal issue. And you can have your views, but when you do what you do, you limit what others can do to express theirs.

Ms. GALLAGHER. This goes to the oddity of having a personal intimate decision to invite the government in to regulate your relationship through law. And it is law.

Mr. FRANKS. Thank you, Mr. Quigley.

Ms. Gallagher, I might just say that many of us wish, in your response to Mr. Quigley, wish we could articulate our position as well as you did. I wish I could say it that well.

I would like to thank our witnesses today for their testimony, each one of them.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be included in part of the record and made part of the record. So, without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion in the record.

With that, again, I sincerely thank the witnesses, and this hearing is now adjourned.

[Whereupon, at 11:20 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Congressman Mike Quigley
Judiciary Constitution Subcommittee-DOMA hearing
April 15, 2011

Opening Statement

Mr. Chairman:

The rights of our citizens are not granted by any branch of government, they are guaranteed by the Constitution.

When the Legislative or the Executive Branches fail to uphold these rights, it has historically been the Judicial Branch which returned our nation to the principles of the Constitution.

The Supreme Court struck down school segregation in Brown v. Board of Education of Topeka, Kansas after a century of inaction by the U.S. Congress.

In United States v. Virginia, the Supreme Court ended gender discrimination at The Virginia Military Institute.

And in Gill v. OPM, and Massachusetts v. HHS, a federal court ruled that Section 3 of DOMA is unconstitutional.

Here again, the judicial branch returned our nation to the principles of the Constitution. Equal Protection under the law demanded no less.

In 1996, Congress got it wrong with the passage of DOMA. But in 2010, our Judiciary got it right.

Judge Tauro reached the decision that Section 3 of DOMA could not survive constitutional scrutiny, for it violates the equal protection clause of the 5th Amendment.

Section 3 of DOMA is not about who has the right to marry; the states decide that. Section 3 is about how couples who already are married under state law will be treated under federal law.

The Government Accountability Office (GAO) has estimated that more than one thousand, one-hundred (1,100) federal laws use marital status to determine federal responsibilities and rights.

Section 3 of DOMA excludes gay and lesbian couples from being considered as family under each and every one of these laws.

This is the opposite of equal protection under the law.

Recently, the Justice Department followed course in concluding that section 3 of DOMA is unconstitutional. By doing so, the Justice Department is not abdicating its constitutional responsibilities, it is executing them.

But let's be clear: DOMA isn't just an unconstitutional law, it's dumb public policy.

Everyone of the stated rationales for DOMA has been refuted by our better judgment or our shared experiences.

DOMA was said to advance the government's interest in traditional notions of morality.

But as the Supreme Court made clear in *Romer vs. Evans*, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral in not a sufficient reason for upholding a law…"

DOMA was said to defend and nurture traditional heterosexual marriage.

But the claim that favoring heterosexual marriage is justified because that provides a better environment for children has been rejected by leading medical, psychological, and social welfare organizations.

These organizations agree that gay and lesbian parents are equal to their heterosexual counterparts.

DOMA was said to protect state sovereignty and democratic self-governance.

Instead, it does the opposite. Section 3 of DOMA violates the state's right to regulate marriage by inducing the state to violate the equal protection right so its citizens.

The legislative record of DOMA shows that its true purpose was simply to express moral disapproval of gay and lesbian couples and families. During floor debate, members repeatedly voiced disapproval of homosexuality as "immoral" or "depraved."

That legislative history represents a stain on this great institution we are all a part of today as well as a betrayal of one of American's most fudamental values: that in this country, we judge every individual on the content of his character.

DOMA was passed by Congress in 1996. The fact that it is such recent history makes it more painful. For even then, I *believe* we knew better.

But more importantly, as I look around the room today at my esteemed colleagues on both sides of the aisle, I **know** we know better.

So that truth begs one essential question: Why are we here today discussing this?

Senator McGovern wrote in 1972, "what is right has always been called radical by those with a stake in things that are wrong."

And although there was a time when mantras like this were a rallying cry at GLBT gatherings in support of issues such as same-sex marriage, it need not be anymore.

Because there's nothing radical about being allowed to marry the person you hold closest in your heart. And there's nothing radical about expecting that union to receive the full protection of the law.

Equal Justice Under the law. These are the words that are emblazoned in stone above the entrance to the highest court in the land.

At times in our history we have fallen woefully short of delivering on that promise. But through the courage and steadfast determination of a vocal few who have insisted on nothing less, we have slowly but surely continued to perfect our union.

Equal Justice under the law. Our Courts get that. Our Executive Branch gets that. It's time that our Legislative branch does the same.

Thank you; and I yield back.

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution

Hearing on
"Defending Marriage"
Friday, April 15, 2011
10:00 a.m.
2141 Rayburn House Office Building

Question for the Record
From Representative Robert C. "Bobby" Scott
To Maggie Gallagher

Q1: If a same sex couple is legally married in Massachusetts, lives in Massachusetts, and owns real estate in Virginia, what happens to the real estate in Virginia if one spouse dies without a will? Would the result be the same if the couple moved to and were living in Virginia when one died?

Answer: I'm not an attorney versed in estate law. I do not know the answer to your question. People who own substantial property ought to consult an attorney and leave a will, generally speaking, otherwise problems are pretty sure to arise.

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution

Hearing on
"Defending Marriage"
Friday, April 15, 2011
10:00 a.m.
2141 Rayburn House Office Building

Question for the Record
From Representative Robert C. "Bobby" Scott
To Carlos A. Ball

Q1: If a same sex couple is legally married in Massachusetts, lives in Massachusetts, and owns real estate in Virginia, what happens to the real estate in Virginia if one spouse dies without a will? Would the result be the same if the couple moved to and were living in Virginia when one died?

Answer: If the married same-sex couple never lived in Virginia, then that state does not have a valid interest in refusing to recognize the out-of-state marriage for purposes of the application of the intestacy statute. In fact, courts in states that had prohibitions on interracial marriages, before they were struck down by the U.S. Supreme Court, consistently allowed non-resident survivors of interracial out-of-state marriages to inherit property under their intestacy statutes. As a result, the surviving spouse in the question's first scenario should be permitted to inherit the decedent's interest in property that the couple owned as tenants in common.

If the couple moved to Virginia prior to the death of one of the spouses, then it is likely that Virginia courts would rely on the state's Defense of Marriage Act to refuse to allow the surviving spouse to inherit the property interest. It should be noted, however, that Section 2 of the federal Defense of Marriage Act would not add anything to the legal analysis. That is, the question of whether an out of state same-sex marriage, entered into by Virginia residents, should be recognized in Virginia is a matter of Virginia law. This illustrates why Section 2 of the Defense of Marriage Act is superfluous and unnecessary.

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution

Hearing on
"Defending Marriage"
Friday, April 15, 2011
10:00 a.m.
2141 Rayburn House Office Building

Question for the Record
From Representative Robert C. "Bobby" Scott
To Edward Whelan

Q1: If a same sex couple is legally married in Massachusetts, lives in Massachusetts, and owns real estate in Virginia, what happens to the real estate in Virginia if one spouse dies without a will? Would the result be the same if the couple moved to and were living in Virginia when one died?

Answer: I have not researched the laws governing inheritance in either Massachusetts or Virginia, and I claim no particular familiarity with them. I therefore think it ill-advised for me to speculate about your questions.

Court File No. 684/00

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

HEDY HALPERN and COLEEN ROGERS,
MICHAEL LESHNER and MICHAEL STARK,
MICHELLE BRADSHAW and REBEKAH ROONEY,
ALOYSIUS PITTMAN and THOMAS ALLWORTH,
DAWN ONISHENKO and JULIE ERBLAND,
CAROLYN ROWE and CAROLYN MOFFATT,
BARBARA McDOWALL and GAIL DONNELLY,
ALISON KEMPER and JOYCE BARNETT

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA, et al

Respondents

and

EGALE CANADA INC. et al

Intervenors

-AND-

Court File No. 39/2001

BETWEEN:

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA, et al

Respondents

and

HEDY HALPERN, et al

Intervenors

AFFIDAVIT OF STEVEN LOWELL NOCK

I, Steven Lowell Nock, of the City of Charlottesville, in the State of Virginia, in the United States of America, make oath and say as follows:

1. I have been asked by the Attorney General of Canada to apply my expertise in research methodology and evaluate the scientific literature concerning the effect of legal recognition of the marriages of gay and lesbian couples on their children, cited in the affidavit of Professor Jerry Bigner, sworn November 11, 2000, and filed on behalf of the Applicants in this case. The articles upon which Professor Bigner's opinion rests are contained in his Exhibit "B" and were previously relied on in the Brief to the court in Vermont, in the case of *Baker v. Vermont.* I have read and evaluated each of those articles.

2. My affidavit is divided into two main segments. In the first, I explain the principles of sound social science research methodology. I describe the characteristics of good research design and highlight the pitfalls that result from the failure to apply proper design techniques. Clearly, where the design of research is substandard, it is dangerous to rely on the conclusions reached if they are intended as truths.

3. In the second segment of this affidavit I analyze the studies presented by Professor Bigner for their value and reliability in supporting the assertions that Professor Bigner says they support. I do this analysis with reference to the accepted methodological techniques and terms described in the first segment of this affidavit. Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research.

4. The task I undertook was to evaluate the relevant studies simply from the standpoint of whether or not they provide reliable answers to the questions or hypotheses their authors intended to address. As a result, my analysis is made solely from the perspective of a research methodologist. I do not make any claim regarding the inherent

truth or falsity of any of the hypotheses proposed to be tested in the studies, or of any converse hypotheses. It is the policy maker who depends on the truth value alleged in the results and conclusions reached through social science. With this in mind, only objective and sound methodological analysis can fulfill the need.

I. Qualifications

5. I am currently a Professor of Sociology at the University of Virginia where I have taught since 1978. I teach both undergraduate and graduate courses. At the undergraduate level, I teach Research Methods, The Family, and Family Policy. At the graduate level, I teach Research Design, Intermediate Graduate Statistics, and Family Research.

6. I am co-founder of the Center for Children, Families, and the Law at the University of Virginia, a multi-disciplinary center to foster collaborative research and teaching on issues involving children and families.

7. My research focuses primarily on households and families. I am concerned with the causes and consequences of changes in family organization and structure. Thus, I have investigated marriage, divorce, and cohabitation by focusing on the factors that lead individuals into these statuses and the consequences of entering them. I am the author of six books and over 50 articles and chapters that are detailed in my *curriculum vitae*, attached as Exhibit "1" to this affidavit. Almost everything I have published relies on quantitative analysis of large, nationally representative samples of adults. My most recent book (*Marriage in Men's Lives*) was based on a statistical analysis of 6,000 men interviewed annually from 1979 through 1993. The book was the recipient of the 1999 American Sociological Association William J. Goode Book Award for the most outstanding contribution to family scholarship.

8. I am also Director of the Marriage Matters Project which is a five-year research effort supported by the National Science Foundation and the Smith Richardson Foundation. This research investigates the legal innovation known as Covenant Marriage in Louisiana. It is a quantitative effort involving approximately 1,200 individuals interviewed repeatedly over the course of five years.

9. I currently serve as Associate Editor for *Journal of Marriage and the Family* and *Social Science Research.*

II. Relevant Issues Of Research Design

a. Introduction

10. Before evaluating the specific claims made by Professor Bigner in his affidavit, I first want to outline the strategies that would produce scientifically acceptable research results concerning the effect of legal recognition of the marriages of gay and lesbian couples for the children in such unions. These strategies are the basis of my evaluation of the articles contained in Professor Bigner's brief as they conform to accepted standards for scientific research.

11. Let me begin by noting that the central question, that is, what effect does gay and lesbian marriage have on children in such unions, cannot be answered at the moment. With the exception of the extremely recent change in the Netherlands, no jurisdiction has yet to recognize the unions of gays and lesbians as marriages. As a result, it is clearly impossible to evaluate how such a change has affected the children involved.

12. Since it is not possible to consider this research question (i.e., would the legal recognition of the marriages of gay and lesbian couples affect the children in such unions), we are left to consider a related question. As I see the issue, there are actually two such questions, only one of which can be answered. First, and most importantly, does a homosexual union of adults cause the children to develop differently than they

would have if they had heterosexual parents (or some other arrangement)? This is a researchable question that can, in principle, be answered. However, the simple fact is, to date, this question has not been answered. Second, does marriage change the behavior of gay or lesbian parents toward their children or toward each other (i.e., does marriage cause relationships to be more stable, cause parents to treat children differently etc.)? While this second question has been addressed with respect to heterosexuals, it cannot be answered with respect to homosexual parents because there has never been a legal marriage of homosexuals. Any answer to this question in regard to homosexual marriage is purely hypothetical.

13. In the comments that follow, I have assumed that the following statement, found in the affidavit of Dr. Jerry Bigner, guides the research: Is it true that "The children of gay and lesbian parents are as healthy and well adjusted as those of their heterosexual counterparts?" (Bigner affidavit, page 6)

b. Correlation and Causation

14. Before discussing how we might address such a question, I want to distinguish between "correlation" and "causation." When two things are correlated, we can show that they tend to vary together. That is, different levels of one tend to be associated with different levels of the other. A well-known example of correlation is the relationship between educational attainment and income. Those with higher levels of educational attainment have higher average incomes. Another well-known example of a correlation is the relationship between divorce and children's educational attainment. Children who experience their parent's divorce before age 16 complete fewer years of schooling, on average. Both of these correlations are well known, and have been replicated enough times to confirm their existence.

15. Correlation, of course, does not necessarily imply causation. That is, in trying to understand what relationship one factor has to the other, it is very unsound to assert that the correlation between educational attainment and income reflects a causal path between the first and the second. Nor is it sound to assert that the correlation

between divorce and educational attainment means that divorce is the cause of children completing fewer years of schooling. From the perspective of a research methodologist, it would be foolish – and, indeed, unsound – to make such causal assertions without more evidence than a simple correlation.

16. To determine that a causal connection exists between any two factors X and Y requires three things:

- X and Y must be correlated;
- X must precede Y temporally; and
- No third factor Z can explain the relationship between X and Y.

17. In the case of educational attainment and income, for example, there is no question that the two are correlated. Nor is there much question that educational attainment typically precedes the earning of income. But what about the existence of a possible third factor? What if high intelligence is the true cause of both higher educational attainment *and* higher income? If so, then the correlation between education and income is spurious. It exists only because the two items share a common cause. We can apply the same logic to the divorce-education example. If poverty is a primary cause of divorce and of poor educational attainment, the correlation between divorce and education is spurious.

18. The primary question that has been asked in the research referred to in the case at hand is, in my opinion, causal in nature. "Does having gay or lesbian parents cause children to differ (from others) in consistent ways. I address how we might answer this and related questions in a way that produces reliable results from the perspective of sound research methodology.

19. To show that having gay/lesbian parents *causes* children to differ, we would need to do three things. First, we would need to show that there is a correlation between living with gay/lesbian parents and some outcome in the lives of children. Second, we would need to show that exposure to gay/lesbian parents happened before the

outcome did. And finally, we would need to show that there is no other factor that is a common cause of both.

20. In a related way, how would we show that there is *no* causal relationship between gay/lesbian parents and children's well being? This requires somewhat less evidence. To establish the validity of such a claim would require only that no correlation be found between the sexual orientation of parents and the child's well being once all other factors have been controlled. If a valid and scientifically adequate study were to show that there is no correlation between having gay or lesbian parents and a child's well being, based on a comparison of representative groups of each type of parent, and differing only on sexual orientation, then most scientists would accept that there is no causal link between the two.

III. The Design Of The Study

a. Introduction

21. In the following section, I discuss the relevant issues required to conduct a study to answer the question being asked in this case. Several methodological issues must be satisfied before one may attempt to investigate the relationship being discussed. In the following sections, I summarize and explain these issues as they pertain to the case at hand. Once I have done that, I turn to the evidence included in Professor Bigner's affidavit. I evaluate that evidence on the various design and sampling criteria I discuss below.

b. Sampling.

22. First and foremost, the ability of any social-science evidence to apply to a larger group depends on the way the sample of cases was obtained. A "probability sample" is one in which every member of a *definable population* has a known probability

of being included in the study. A probability sample is always necessary in order to generalize one's results. The simplest form of probability sampling is known as "simple random sampling" (SRS). In SRS, a researcher first defines some population to which she or he wishes to generalize the results of the study. This may be a population as large as all voting adults in Canada, all adults in Canada, all children in primary grades, or as small as all patients with newly diagnosed breast cancer. Regardless of the population of interest, the researcher must be able to define it. Once defined, every member of the population must have an equal chance of being selected for participation in the study. If, for example, the population was defined as the 480,000 (1996) residents age 25 and older in the geographic limits of the city of Toronto (at that time), then every single one of these 480,000 residents must have the same chance of being selected into the sample. Simple random sampling guarantees that the chances of selection (from the defined population) are equal for all cases. A detailed explanation of how simple random sampling is achieved is contained in the paragraphs I have written in Appendix I to this affidavit.

23. As indicated, a probability sample is required whenever a researcher wishes to make claims about the larger population from which the sample was drawn. If the goal is to make general claims about same-sex parental relationships and the children who might be affected by them, then we must have a probability sample drawn from the larger population of homosexual parents and children.

24. A probability sample does not guarantee that the results will fairly and accurately describe the larger population. Indeed, it is possible for such a sample to err in large and important ways. For example, imagine drawing a simple random sample of 1,000 from all employed persons aged 15 and older with reported incomes in the Toronto metropolitan area. We know that the average (annual, 1995) income reported by Statistics Canada for this group of Toronto residents is $28,980 [1]. But is it possible that our

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[1] http://CEPS.statcan.ca/english/profil/Details/details1inc.cfm?PSGC=35&SGC=53500&A=&LANG=E&Province=All&PlaceName=toronto&CSDNAME=Toronto&CMA=535&DataType=1&TypeNameE=Census%20Metropolitan%20Area&ID=605

random sample could produce an average of $38,980, an average that is $10,000 higher than the actual value at that time? It is quite possible. Since the sample was drawn randomly, it is possible that an unrepresentative group of 1,000 people was selected. But it is not *probable*. In fact, such a result would be extraordinarily unlikely. And that is the important point about probability samples; we are able to calculate how unlikely such a result would be.

c. Probability Theory

25. In practice, we cannot know if our particular probability sample is a fair and representative reflection of the population from which it was drawn. As a consequence, we apply probability theory to the results obtained from such samples. Rather than claim that our results do, in fact, reflect the true situation in the population, we attach a probability of error to any such claims. This is what is meant by "statistical significance." The statistical significance of any sample result refers to the probability that the true (but unknown) value in the population differs from that result.

26. There is no alternative to the use of probability theory when the goal is to generalize from a sample to a larger population. And there is no alternative to a probability sample when one applies probability theory. Without a probability sample, a researcher cannot use statistics that are designed to generalize from samples to populations (i.e., inferential statistics). Though this is sometimes done, the researcher who does so has violated the most basic premise of inferential statistics.

d. Variations in Sample Quality

27. The quality of samples varies enormously in social science research. Deviations from pure random sampling are not uncommon. But the quality of the sample is directly related to the intended use of the information obtained from it. At one extreme there is exploratory data gathering that is merely intended to generate ideas and hypotheses for more systematic analysis at a later stage. Examples of such samples

include undergraduate students taking a course from a professor, or "mall-intercept' interviews (where a researcher recruits people as they walk by in a shopping mall). At the other extreme are large-scale continuing studies that are used to supply information for policy decisions of the federal government. A good example is the Current Population Survey (CPS) conducted by the U.S. Bureau of the Census for the Bureau of Labor Statistics every month. The CPS has been conducted for 50 years, and provides information about consumer behavior, income trends, and related economic indicators.

28. Particularly relevant to the current issue are instances where a population is difficult to define or identify. Such rare populations present problems since no lists are available to identify them. Locating these populations then requires a search for a probability sample of the general population (i.e., a screening of the general population to identify the members of the rare population). Appropriate techniques exist for such problematic cases, and typically require screening. For example, if a researcher is interested in obtaining a sample of individuals who smoke pipes, a large general population sample would be contacted, and each respondent asked whether he or she smokes a pipe. Sometimes, such screening is made more efficient when the researcher is able to identify geographic clusters (regions) that have higher rates of the rare cases. It is also more efficient if the researcher is able to identify those clusters with no rare cases.

e. Sampling Issues for Research in this Case

29. We do not have a precise estimate of the prevalence of homosexuality in the general population. And sampling is complicated by the stigma associated with the issue. Still, no published estimate that I know of has placed the prevalence above 10%. The most-cited source for the 10% estimate of "more or less exclusively homosexual males" is the work of Kinsey and associates from the late 1940s.[2] Unfortunately, Kinsey's research did not use a probability sample. Moreover, we do not have an agreed-upon definition of homosexuality. Is a homosexual a person whose erotic interests are

focused on those of the same sex? Is a homosexual a person who sometimes engages in sexual acts with a member of the same sex? Is a homosexual a person who thinks of himself or herself as a homosexual? Does a single sexual act with a person of the same sex define a person as a homosexual? Also important in the case is how to define "bisexual?" Are bisexuals to be treated as homosexuals, heterosexuals, or both? And how does one decide? Is homosexuality "learned" (i.e., socially constructed), or is it transmitted genetically? Finally, is male homosexuality the same phenomenon as female homosexuality? Answers to such questions have direct and important consequences for how one investigates the topics in this case.

30. Unless the researcher is able clearly to define what "homosexual" means, he or she is forced to let subjects define the terms as they wish. In the research relied on by Professor 7Bigner, which I reviewed for my opinion on its validity and reliability, this is what was done. Researchers allowed subjects to define themselves as homosexual or heterosexual without further specifications. Quite simply, by relying on volunteers (rather than a sample defined by some specific definition), the researchers cannot know what is being studied. More critically, the use of volunteers means that it will never be possible to replicate the findings of the research. Should another researcher conduct a similar study but find different results, it will be impossible to know why.

31. Depending on how one defines the term homosexual (or gay, or lesbian), different estimates of the prevalence are obtained. The work of Laumann, Gagnon, Michael, and Michaels (1994)[3] was based on personal (face-to-face) interviews with a probability sample of 3,432 adults and is probably the best source of information currently available on the prevalence of homosexuality in the United States. The population to which this sample may be generalized includes all English-speaking adults between the ages of 18 and 59 who resided in households (i.e., not institutions) at the time of the study. Using various definitions of homosexuality, these researchers found

[2] Sexual behavior in the human male by Alfred C. Kinsey, Wardell B. Pomeroy and Clyde E. Martin. (1948); Sexual behavior in the human female, by the staff of the Institute for Sex Research, Indiana University: Alfred C. Kinsey and others (1953).

that rates varied somewhat by sex when the question pertained to sexual behavior with a person of the same sex, as seen below:

1. Any same sex partners in the past 12 months?	1.3% women, 2.7% men
2. Any same sex partner since puberty?	3.8% women, 7.1% men

32. When the researchers asked about attraction to members of the same sex, or sexual desire for members of the same sex (alternative definitions of homosexuality), somewhat different values were obtained, with higher rates of "desire" and "attraction" than observed for behavior. And when asked about sexual identity (how one thinks of oneself), rates were different yet, with 1.4% of women, and 2.8% of men identifying with a label denoting same-sex sexuality.

33. Recently published research based on several large, nationally representative probability samples of all English-Speaking non-institutionalized adults age 18 and over[4] produced comparable rates of prevalence. Most of the data in this study were obtained with anonymous, self-administered questionnaires rather than face-to-face interviews. By combining years of the General Social Survey from 1988-1991, 1993, 1994, and 1996, as well as evidence from the Laumann, et. al. study just described, these authors report that 3.6% of women, and 4.7% of men have had at least one same-sex partner since age 18. Only 1.5% of women and 2.6% of men had exclusively same-sex partners in the last 5 years.

34. I was unable to locate any probability samples of Canadian homosexuals and will, therefore, use U.S. estimates in this section.[5] How rare is the homosexual population in the United States? If we take the studies just mentioned as the best evidence, we would conclude that somewhere between 1% and 4% percent of adult

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[3] E.O. Laumann, J.H. Gagnon, R.T. Michael, and S. Michaels. The Social Organization of Sexuality: Sexual Practices in the United States. 1994. Chicago: University of Chicago Press. Chapter 8.

[4] D. Black, G. Gates, S. Sanders, and L. Taylor. "Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources." Demography, 37 (No. 2) 2000: pp139-154.

[5] However, based on my understanding that, to a large degree, the populations of the United States and Canada share common roots and cultural, at present I have no reason to believe that the results would be radically different.

American women, and between 3% and 7% of adult American men are homosexual by at least one definition of that term. Surely this is a relatively rare population, yet one sufficiently large to allow researchers to rely on probability samples for analysis. Still, even when large, nationally representative samples are used, the proportion of homosexuals who might be parents will be smaller, clearly, than these low figures. In sum, the population of homosexual adults is small. An adequate probability sample of such a population, would requires a large amount of screening to produce as many as 500 homosexual parents.

35. If we take a midpoint estimate as the best guess of prevalence, then we would expect approximately 2.5% (halfway between 1% and 4%) of female and 5% of male (halfway between 3% and 7%) subjects to be identified as homosexuals by at least one definition of the term. If a researcher screened 20,000 individuals for study, hoping to generate a probability sample of homosexuals, we would expect to obtain approximately 500 female and 1,000 male subjects for analysis. Of these, only a fraction would be parents. As a very crude estimate of that fraction, we might consider the fraction of couples living in common-law relationships in Canada who live with children, or the fraction of married couples in Canada that live with children. (I use these two groups on the assumption that, at this point in time, the vast majority of homosexual parents bore their children in marriages or common-law heterosexual unions.) The 1996 Canadian Census found that 47% of Common-law Couples, and 61% of Married Couples have children at home. Therefore, I would expect that homosexual adults would fall midway between these two values. Assuming that 54% of homosexuals are, at present, parents, this means that about half of any sample of homosexuals would initially qualify for our study. Of the 1,500 homosexuals identified by our screening methods, we would expect 810 currently to be parents. Further qualifications would likely reduce this number further, because not all of these homosexual parents would be living, or have lived, with their children. I have no evidence that would allow me to estimate that fraction. For the sake of illustration, however, let us assume that the fraction of homosexual adults who currently live with their children is 50%. Now our sample has been cut to only 405.

36. With current statistical methods, such samples would be adequate for preliminary research. Samples of twice this size would be adequate for almost any statistical purposes. If our goal is to produce a nationally representative sample of homosexuals sufficient to support most multivariate statistical techniques of the type needed to answer the questions at hand, we would probably need to screen about 40,000 individuals. This is not a particularly large screening task, however. For example, the Current Population Survey (U.S. Bureau of the Census) interviews (not simply screens) approximately 50,000 individuals every month. Still, the sampling task is challenging, and very expensive. But most importantly, in relation to the issues at hand, no one has done this to date.

37. To put the sampling problem in perspective, 2.8% of Canadians are members of an Aboriginal group, 2.5% of Canadians are Baptists, and 5.6% of Canadians are at least 75 years old[6] The sampling task that would be involved in a study of gay and lesbian adults (of which some fraction would be parents) is comparable to the challenge faced by any researcher hoping to study one of these populations in Canada and obtain conclusive results that may be relied on to make very important, or potentially irreversible, policy decisions.

38. Sampling rare populations is a challenge that researchers face all the time.[7] Homosexuals are probably no more difficult to locate and interview than homeless individuals, those who have been the victim of crimes in the past year (without reporting the incident to the police), or those who have had abortions. All have been the subject of scientific investigation. The crucial point is, however, that without a sample of the type just described, it is impossible to make scientifically valid claims about the population of homosexuals and their children.

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[6] http://www.statcan.ca/english/Pgdb/People/popula.htm#oth

[7] My ongoing research about the legal innovation known as "covenant marriage" in Louisiana, focuses on a very rare population. Fewer than 5% of all new marriages in the state are celebrated as covenant marriages. Newly married people, moreover, are a small fraction of all people in the state. Still, I have been able to assemble a probability sample of approximately 600 individuals who have entered covenant marriages within the past 12 months with response rates ranging from 65% to 75% (depending on the month). It is, indeed, difficult to locate and interview people who are in rare populations.

f. 'Convenience' Methods of Sampling

39. Before concluding, a brief note should be added about obtaining samples when probability methods are not used. All such strategies depend on various types of 'convenience' methods. Sometimes researchers will recruit subjects into a study by placing advertisements in various outlets. Sometimes researchers will resort to "snowball" sampling, where a subject mentions another, who mentions another and so on. And, sometimes researchers will use an existing group (e.g., students in a class, members of an organization). No such method is permitted by sound scientific methodology when the goal is to generalize to a population, because all such samples are biased in unknown ways. Particularly problematic with rare samples is the snowball strategy. The reason this strategy is so bad is because individuals who are well-known are more likely to be mentioned than those who are not well-known. And well-known individuals in rare populations often differ in important ways from those who are less well known. A well-known lesbian (if the individual's decision to be known as lesbian is a well-considered decision) is likely to be a different type of lesbian than is her less well-known counterpart.

40. The simplest way to understand why a sample might be biased is to consider a convenience sample recruited from an organization devoted to seeking equal rights for gays and lesbians. Suppose that the homosexual participants in this group have higher levels of education than comparable homosexuals who are not members of this group. If this group were used for research purposes, then anything that is correlated with educational attainment would be biased. For example, we know that higher education is associated with better health. If we extrapolated (generalized) about the health of homosexuals from this sample, we would be making claims about a population based on a group that does not represent it. The reported health of this particular group would probably be better than would a representative sample.

g. Cross-sectional vs. Longitudinal Studies

41. The conclusion must be that a scientific study of how parents' homosexuality affects children must begin with a probability sample of a well-defined population. However, once the population has been defined, and before the execution of the actual sampling, one additional issue must be resolved.

42. Depending on the topic being studied, the researcher must decide whether to conduct the study only once, or conduct it repeatedly over time. The former is typically known as a cross-sectional study and the latter as a longitudinal study. When the only goal is to estimate percentages, rates, and such descriptive information about a population, then a cross-sectional study is often adequate. However, when the goal is to produce evidence about cause, as in the present case, cross-sectional studies are considered especially weak. Longitudinal studies are always preferred when the issue is one of cause-effect.

43. In a cross-sectional study, a group of individuals is contacted once (or several times in quick succession -- for example, several interviews in the course of a day). Information obtained in this way is limited in its ability to produce evidence of change. Without evidence of change, there is very little one can say about cause.

44. The problems of cross-sectional studies are particularly severe when the temporal ordering of the phenomena in question is unclear, that is, where the cause and effect of the two correlated factors may go either way. For example, repeated studies have found that politically conservative individuals have higher incomes. If one were attempting to draw causal conclusions about this correlation, it would be impossible to conclude that higher incomes cause people to become more conservative, because, just as likely, is that holding conservative political positions causes people (for whatever reason) to earn more money. And, of course, as discussed at the outset, there may be absolutely no causal connection between political conservatism and income simply because the two factors are correlated.

45. The second requirement for establishing causation (noted above) is that the cause must *precede* the effect in time. While this is often impossible to determine with absolute certainty, the scientific plausibility of this claim is enhanced significantly when the researcher is able to observe the same individuals repeatedly, over time.

46. Longitudinal studies of the same individuals are known as panel studies. A panel is a group of individuals who are observed, or who answer questions repeatedly over a specified period of time. Well-known examples of large panel studies include the Panel Study of Income Dynamics (PSID), the National Survey of Families and Households (NSFH), the U.S. Census Bureau's Survey of Income and Program Participation (SIPP), and the National Longitudinal Survey of Youth (NLSY). Each of these panel studies includes at least 5,000 individuals who were studied at least twice.

47. When interest focuses on developmental issues (phenomena that emerge over time) a panel study is particularly important. Some processes may require years to become obvious, while others may become immediately apparent. To the extent that the process being investigated develops slowly over the course of several years, then a panel study of long duration is needed to capture this event. If, for example, a researcher studied the transmission of homosexuality from parent to child, what could be learned by a study of 8-year old children? Perhaps a great deal. But more likely, such a study would need to follow these children for several years to investigate the possibility of change over time. A longitudinal study would need to be started when children are young (perhaps 2 or 3), and would need to follow children throughout a significant period of their lives to measure any possible changes.

48. If a researcher is able to show that whenever an individual changes (over time) on one dimension, he or she also changes in predictable ways on another dimension, this is strong (though not incontrovertible) evidence of a causal connection. Thus for example, in my research on marriage in which I relied on a panel study of 6,000 men interviewed annually for 13 years, I was able to show that when men got married (i.e., changed from being single to being married), their incomes also changed by a

predictable amount and direction. I also found that a change in marital status was accompanied by a change in men's propensity to give help to others. These and similar patterns led me to suggest that the relationship was causal. Simply put, I argued that marriage causes men to change in the ways I observed. The reason I made such assertions, it is important to note, is because I had clearly satisfied two of the three logical requirements for establishing a causal connection. I had clearly established a correlation between marriage and several other phenomena. And I had clearly established a temporal order in which the change in marriage routinely came before the change in the other phenomena. The third requirement for establishing cause (no other factor responsible for the presumed cause and the presumed effect) was handled with multivariate statistical techniques. These are an approximation of an experiment[8], and cannot completely eliminate the problem. As a result, the evidence I presented in *Marriage in Men's Lives* can never be asserted to be proof of causation. It is, however, as close as we can get without conducting an experiment.

IV. Translating Concepts Into Measures

a. Introduction

49. Before gathering a single datum from a sample, one must first translate the concepts of interest into indicators that can be measured. This is a central part of the entire process of designing the data-gathering procedure. Sometimes, the project calls for a questionnaire survey. Typically, in such cases, the concepts to be investigated are translated into specific questions on a questionnaire. In other cases, the research project calls for direct observations of individuals. When this is the method to be used, concepts are typically translated into observable behaviors that can be counted, coded, or otherwise recorded.

[8] An experiment is the intentional manipulation of a group of subjects. No naturally occurring phenomenon can be considered to be an experiment. (See Appendix II for further explanation.)

50. For example, suppose a researcher is interested in the concept of generosity. Before it will be possible to investigate this concept, the researcher must arrive at some way to measure generosity that, in fact, can be measured. Strictly speaking, the concepts that are most often studied by social and behavioral scientists are not immediately apprehended. That is, there is no way to apply the five empirical senses (hear see, touch, taste, or feel) to determine their existence. One cannot see, touch, taste, hear, or feel generosity. Rather, generosity is an abstract concept that must be translated into indicators that may be discerned empirically. For example, the researcher might decide that any gift of money without direct compensation is an act of generosity. Now it becomes possible to empirically measure generosity. The researcher might ask individuals about their gifts of money in the past month, and whether there was any direct compensation. If the researcher is willing to believe the answers given to such questions, then he or she is able to measure such things as how many times an individual gave money, and how much money he/she gave. In this fashion, the researcher might make claims about the measured generosity of individuals, noting clearly how that term was defined. Regardless of whether others accept this definition of generosity as valid, the researcher has conformed to accepted scientific practice by clearly and specifically defining his concept. The simplest way to determine whether a concept has been defined is to ask if another researcher could replicate the study using the same empirical measures.

51. Scientific evidence accumulates and gains credibility only through replication. The precise definition of all concepts to be used is crucial to the capability to replicate studies.

b. Operational Definitions

52. In social science literature, the process of translating a concept into one or more empirical indicators is known as developing an operational definition of a concept. An operational definition of a concept is comparable to a recipe for a favorite dish. If one follows the recipe exactly without deviating from it, one will reproduce the desired

outcome. The dish can be replicated because there is a recipe for it. In social science research, the concepts used frequently come to have conventional operational definitions. Researchers using accepted operational definitions are able to replicate others' research, and build upon it. In this fashion, social science advances, as any science might.

53. A good example is the (seemingly) simple concept of education. By convention, most social scientists accept "years of schooling completed" (or the highest degree earned) as an operational definition of education. Two people who differ in the number of years of completed schooling do not necessarily have different amounts of education in a more fundamental sense (there are, that is, obvious exceptions to the relationship). But the two people are considered to have completed differing amounts of schooling. The presumed relationship between the concept (education) and the indicator of it (years of schooling) is referred to as the validity of a measure. A valid measure is one that clearly measures the concept of interest. Most social scientists are willing to accept "years of completed schooling" as a valid indicator of the concept "education."

c. Valid Indicators

54. The first requirement for a valid indicator is an operational definition. Technically, it is never possible to prove that an indicator is valid because no abstract concept can ever be measured. However, with repeated usage, and with repeated critiques of empirical indicators, social scientists have agreed on several strategies to gauge the presumptive validity of an indicator. For example, does one's measure of the concept correlate with the factors one would expect it to ('predictive validity')? In the case of education, we would presume that any valid measure of it would correlate with the prestige of one's occupation (i.e., we presume that people with more prestigious occupations also have more education). So the researcher would determine whether "years of completed schooling" correlates with established measures of occupational prestige. In fact, these two factors correlate positively, providing minimal assurance that the operational definition is valid. Researchers typically ask experts in their field to review their measures to check the presumptive validity ('face validity').

55. With regard to the question at hand, we would need operational definitions of "gay", "lesbian", "bisexual, "parent", "child", "child's health", and "child's well being." Some of these present little problem (e.g., Statistics Canada has definitions of "parent" and "child", while psychologists have developed several measures of emotional and psychological health.) The operational definitions of "gay," "bisexual," and "lesbian" would be the most challenging concepts to measure, although several strategies have already been noted.

d. Reliability

56. Once an operational definition exists, a researcher is able to establish the degree to which the measure has another desirable property, that of reliability. A reliable measure is one that consistently reports the same value for the same magnitude of some phenomenon. An unreliable measure is one that fluctuates unpredictably in the values it produces. For example, we might ask if a particular IQ test is a reliable indicator of mental ability. To answer that question, we would need to know whether the same test, applied repeatedly to the same individual, would yield the same IQ score. If it did, then the test is reliable.

57. A common threat to the reliability of any measurement is the use of a single observer to record the measurement. For instance, if a single researcher conducts repeated interviews, recording the warmth of parent-child relationships, for example, there is no way to estimate the observer's subjectivity. If several observers conduct the same types of interviews, however, it should be possible to make some estimates of this possibility (i.e., inter-rater reliability).

58. Reliability is assessed in several ways. Sometimes a researcher will ask the same question, or use the same measurement strategy more than once (in surveys and various tests, slightly different wordings of the same question are typically included to tap this type of reliability). A similar strategy relies on the use of multiple measures of

the same concept. If a researcher is attempting to measure a subtle concept such as generosity, she might include 10 measures of it on a questionnaire. Any five such measures should classify a respondent the same way (i.e., as generous or not) as any other grouping of five measures. But the best and simplest strategy is to rely on established measures. To the extent possible, researchers rely on measures that have been used before, and for which there is general consensus among social scientists about reliability.

59. A good indicator is one that is both valid *and* reliable. Unfortunately, reliability is not necessarily a guarantee of validity. My bathroom scales are very reliable. Every morning last week they weighed me at 76.8 kg. But when I went to my physician yesterday for a routine check-up, her more accurate scales weighed me at 78.2 kg. in exactly the same clothing. Clearly, while reliable, my bathroom scales are probably not valid (assuming that my physician's scales are). Rather, my bathroom scales are biased.

e. Bias

60. Bias is a consistent error of measurement. A biased measure will consistently err in exaggerating or minimizing the magnitude of the issue being considered. Bias is introduced into a study in many ways. Sometimes the question asked is the problem. For example, if we simply ask people to report their age, we often find (in large surveys) that there are disproportionately large numbers of people who report being 20, 30, 40, 50, etc. years old, suggesting that people round their reports of their age to the nearest decade in many cases. The question in this case introduces a bias toward decades of age. It is for this reason that most survey researchers ask people to report their date of birth rather than their age. There does not appear to be bias in the former.

61. Sometimes bias or unreliability is a result of the method used to obtain information. Many people are reluctant to divulge sensitive information. If we ask questions about topics such as masturbation, cheating, adultery, or lying, we know that many people will "under-report" the true incidence. It is for this reason that researchers

invest great effort to design their questions and methods to minimize such biasing tendencies.

62. In questions about sexual behavior, or other very personally sensitive topics, researchers have found that telephone interviewing (where there is no face-to-face contact), the use of self-administered anonymous questionnaires, the use of computer-assisted-personal-interviewing (CAPI)(where the subject completes a series of questions on a lap-top computer with headphones) or very direct and blunt questions work best. Clearly, we should anticipate some problems with any question about a person's sexual orientation. Such questions, used either in screening, or in the actual study, would need to be carefully designed and tested. Studies do exist, that have investigated sexual orientation, while overcoming such problems for both adults and children (e.g., Laumann, et. al., and the Adolescent Health Panel Study).

63. How do researchers know if their methods or questions are likely to be a source of bias? They pre-test questions and methods. Before conducting the actual project, a sound researcher conducts a small test of the procedures. The purpose of this pre-test is to ascertain whether the questions to be asked, or the methods to be used work as the researcher intends. A small (typically 5 to 15) group of individuals drawn from the population of interest is asked to complete the study. The researcher then interviews the participants (individually, or in a group) about the procedures used, and the methods for gathering information. He or she will ask about each question on a questionnaire. Did this question make sense? What did it mean to you? How did you understand the intent of this question? Did you know how to answer this question? What about the length of the task? Did it take too long? Were you tired or bored? Do you have any concerns about this study? Do you understand the purpose of it?

64. Typically, the result of a pre-test is a minor revision of the data-gathering strategy. Some words are found to be confusing. Some questions are found to be threatening. Some projects are found to be too long, or too demanding. The researcher attempts to correct such problems before launching the full project. A pre-test is no

guarantee that the researcher has solved all the problems of potential bias associated with the instrumentation. But generally, it is regarded as necessary.

f. Assembling The Appropriate Comparison Group.

65. There is still one critical design issue to be answered before gathering the data for a project. Recall that if we are attempting to answer the question "Are the children of gay and lesbian parents as healthy and well adjusted as those of their heterosexual counterparts?" we must be able to rule out any third factors that could conceivably mask or cloud the issue. How might this be done?

66. What researchers have tried to do, in the studies reviewed, is determine what effect, if any, there is of having homosexual parents. To do this in a sound methodological manner they must somehow be able to compare children who differ in their circumstances on only this one dimension.

67. Imagine, for example, that we were to compare the children of highly educated and wealthy homosexuals to the children of heterosexual parents in poverty. Imagine further that we compared the two groups of children in terms of their involvement with the juvenile justice system. Without doing this study, we can anticipate what such a project would reveal. Since we know from other research that children living in poverty are more likely to be involved in delinquent acts, the comparison between children with homosexual and heterosexual parents would undoubtedly show that the children of homosexual parents have significantly lower rates of delinquency. So the question is whether such a difference reflects the consequence of having homosexual parents, or of poverty?

68. To make a convincing case about the consequences of having homosexual parents, a researcher would need to compare children living with homosexual and heterosexual parents but who did not differ on any other important dimension. A failure to compare children identical (or almost identical) on all important other dimensions

except the sexual orientation of their parents would be sufficient to invalidate the study. The only way possible to make two groups identical except for one factor is to use the process of a the classic experiment which is detailed in the paragraphs in Appendix II to this affidavit.

69. The problem for most social scientists is that experimentation is neither feasible nor ethical. Quite simply, there is no feasible or ethical way to randomly assign children to living with either heterosexual or homosexual parents. And since we cannot do this, we must resort to various approximations to an experimental design. Every approximation shares the same objectives. All seek to make it possible to compare individuals on only the issue being studied; all seek to remove other factors from the study in one fashion or another.

g. Statistical Control

70. On the matter of comparison groups, there is simply no option. A researcher must either resort to random assignment of cases, or statistical control. The latter refers to a class of statistical techniques that mathematically remove the effect of various confounding factors.

71. For example, suppose we wished to compare a group of homosexual and heterosexual parents obtained in a probability sample of all Canadians for the purpose of investigating whether the children of one group or the other are more likely to skip school. Suppose further, that the homosexual parents were found to have much higher average incomes than the heterosexual parents. (That is, some fraction of the homosexuals has extremely high incomes, and few have very low incomes, while the reverse is true for the heterosexuals.) The researcher is interested in the effect of sexual orientation, and not the effect of income on children's truancy. Even if homosexuals do have higher average incomes than heterosexuals, the researcher will still want to know the effect of sexual orientation because many homosexuals will have incomes

comparable to many heterosexuals. How, then, does the researcher isolate the factor of interest – sexual orientation?

72. To simplify the strategy, one can imagine that it would be possible to determine whether parental income affects truancy. Let us assume that it is found that every $1,000 less in family income is associated with a 1% increase in truancy (i.e., children from families earning $45,000 have 5% more truancy than do children from families earning $50,000.)

73. Finally, assume that the average difference in "family" income between the homosexual and heterosexual parents is $10,000. Since every $1,000 difference in income is associated with a 1% difference in truancy, we would expect the children from the two groups of parents to differ by 10% simply due to their respective family incomes. Before we compared the two groups of children on the issue of their parents' sexual orientation, we would "adjust" for the income difference. If family income were the only difference between the two groups (except for sexual orientation), then the two groups of children must differ by more than 10% before we can begin to consider the possibility that homosexuality produces any effect on children's. truancy. Alternatively, should we find that the children of homosexuals do not differ at all from the children of heterosexuals in their truancy rates, we would probably conclude that homosexual's children actually have higher truancy rates than those of heterosexual parents. This is because we would expect an income effect absent any consequence of homosexuality. Failure to find significantly lower rates of truancy among the children of (more affluent, on average) homosexual parents, therefore, is actually evidence of a difference attributable to the sexual orientation of the parents.

74. The example above simply illustrates that if samples that are not equivalent on all factors except one, (here, homosexuality of the parents) then finding no difference between children cannot render a scientific conclusion that the sexual orientation of parents has no consequences for children. (Indeed, such a finding may be evidence that parents' sexual orientation has enormous consequences for children.) The

important point is that the relevant question that must be asked is whether the researcher statistically controlled for all reasonable factors that might influence children other than the parent's sexual orientation. In my opinion, failure to do this invalidates any study of the consequences of a parent's homosexuality. In scientific research, a lack of correlation between two factors is sometimes the result of a failure to control for other relevant factors. This is the problem of a spurious non-correlation (a topic to be discussed later).

V. Gathering the Data.

a. Introduction

75. A researcher with a clearly defined question (which we have in this case), who has a definable population, has developed a sampling strategy that is both feasible and scientifically defensible, who has translated all concepts into valid and reliable indicators, and who has pre-tested all instrumentation is ready to gather data.

b. Gathering Methods and Guidelines

76. The choice of data-gathering methods will depend on many factors, including the resources available to the researcher, the topic, and the purpose of the research. Regardless of the method(s) used, however, there are several basic guidelines. First, to the extent possible, the researcher should do everything possible to minimize his or her role as a stimulus. That is, subjects should respond to the instrument rather than to the researcher. In face-to-face interviewing, for example, the researcher should be a neutral presence to the extent possible. This may require the use of different interviewers for different subjects. Dress and demeanor (including dialect or other speech patterns) are sometimes thought to influence the type of answers subjects provide. Race, similarly, may be an issue for certain topics. Again, to the extent possible, the researcher should be sufficiently familiar with the subjects and with the interview instrument to minimize his or her role in the data-collection.

77. The presumption in social science research is that data gathering involving human subjects should be regarded as a stimulus-response situation. The desired objective is that every subject will respond to the same stimuli. Indeed, this is one of the strengths and weaknesses of self-administered survey questionnaires. Each questionnaire is identical, and the researcher is not present when it is completed. At the same time, the researcher cannot assure that the conditions under which the questionnaire was completed were identical for all subjects. Some may have discussed their answers with others. Some may have been watching TV while completing the questionnaire, and so on. Face-to-face survey interviews, on the other hand, offer the researcher the opportunity to explain issues, to observe the circumstances under which the instrument is completed, and to take notes on issues that might be relevant in the analysis of the results (e.g., the subject appeared to have been under the influence of alcohol).

78. Another general guideline is that the researcher should use multiple methods of gathering data, if at all possible. If a project relies on both self-administered surveys and face-to-face interviews, the researcher gains the ability to compare the results of the different methods. Every method has its known weaknesses. Should two methods produce similar results, the researcher has greater confidence in her results because there has been a replication of sorts.

c. Response Rate

79. Finally, regardless of the method used, the researcher must attend to the very important issue of response rates. Once a probability sample has been drawn, the researcher's goal is to obtain complete information from *every* member of it. To the extent that this is not done, unknown biases are introduced into the study. Consider the typical political poll done before most national elections. These rely on telephone interviews with individuals in a sample of all telephone numbers. Researchers generate random digits as part of the telephone number to insure that unlisted and listed numbers have equal probabilities of selection. Once a desired sample (typically between 800 and 1,200) is drawn, the task is to contact each of these numbers and interview a respondent

(chosen according to various strategies to randomly select one member of multiple-person households). In drawing this sample, telephone interviewers must contend with many problems relating to service (is the phone a residential line?), and eligibility (does the resident qualify for the study?). But many people cannot be easily reached by telephone. The use of answering machines, and various screening technologies (e.g., "caller ID") alert the subject to the origin of the incoming call. Many people simply will not answer calls from unknown sources. Others are unwilling to talk to someone who identifies him or herself as an interviewer, and so on.

80. Telephone interviewers, therefore, face tremendous problems in completing interviews with all members of their original sample. Possibly, there is no great consequence. But possibly, there is enormous consequence. Which of these possibilities is more likely depends on whether the subjects who could not be interviewed resemble those who were in important respects. For example, if wealthier subjects are less likely to be interviewed, then the results of the study no longer generalize to the population from which the sample was drawn.

81. Generally speaking, the issue of response rate pertains to self-selection. Once a random probability sample is drawn, inevitably, some members will not be contacted. To the extent that they do not differ in important ways from those who are contacted, then the scientific integrity of the sample is probably not compromised significantly. But this is not something that is easily determined. Since those who are not contacted are typically unknown, the researcher is often unable to estimate the magnitude of the self-selection bias. In sum, when some sampled subjects agree, while others disagree to participate in a study, this self-selection creates a potential source of bias in the result.

82. If a researcher does not use a probability sampling method, but instead allows subjects to volunteer for any reason they wish (e.g., placing an ad in a newspaper to recruit subjects), then every single member of the study is self-selected. Unless the researcher can know the difference between those who do and do not volunteer, or make

some reasonable assumptions about such differences, the study cannot be treated as scientific evidence.

83. In practice, researchers almost never contact every member of the original probability sample. The fraction that is contacted and completes the instrument defines the response rate. How high should the response rate be to allow conclusions to be drawn from the results? Conventional standards in social science now regard a response rate of 80% to 95% as excellent, of 70% to 80% as very good, and of 60% to 70% as acceptable. Response rates below 60%, however, are reason to believe that the actual sample obtained differs in unknown ways from the sample initially drawn. Obtaining high response rates, in short, is crucial. It is for this reason that survey research often involves repeated attempts to contact members of the original sample (repeated telephone calls, or repeated visits to a residence, often as many as 8 or 10 times before dropping a case).

84. Once the data are obtained, the researcher is obliged to check them to verify that there are no significant and obvious errors. This is a small but important step before the analysis begins.

VI. Analyzing The Results.

a. The Research Hypothesis

85. The researcher is now ready to conduct the actual analysis of the data. Any questions about a correlation or a cause-effect relationship are stated in the form of hypotheses that are tested with statistical techniques. Generally speaking there are two types of hypotheses central to any research project of this sort. An hypothesis is defined as an assumption about the population represented by the probability sample of it.

86. The Research Hypothesis is what the researcher expects and hopes to find. The Research Hypothesis consists of the assumptions about a population that we are

willing to make and believe in. Were we testing a new vaccine against measles, our Research Hypothesis would be that the vaccine does, in fact, reduce the incidence of measles. This hypothesis is not intended to be exposed to a test with statistics. The remaining hypothesis/hypotheses to be tested (the testable hypothesis) is typically referred to as the Null Hypothesis.

b. The Null Hypothesis

87. The Null Hypothesis is what the researcher actually tests. Usually, the Null Hypothesis consists of a statement that a certain population value (e.g., the percent of voters who will vote for candidate X) is equal to some given value. Statistically, this hypothesis is called the null hypothesis since it implies that there is no difference between the actual (true) value in the population, and that which is being hypothesized.

88. Consider the statement that "homosexual and heterosexual parents spend an equal amount of time helping their children with homework." This can be understood as a testable hypothesis stating that the population averages of the two groups are equal. The researcher who has drawn a random probability sample of homosexual and heterosexual parents would compare the average time spent helping children with homework by the two groups. The Research (or Alternative) Hypothesis in this case would be that the two averages are not the same.

89. Note that this Research Hypothesis actually includes several possibilities:

1. Mean for homosexuals > Mean for heterosexuals,
2. Mean for homosexual < Mean for heterosexuals, and more generally,
3. Mean for homosexuals $\neq$ Mean for heterosexuals

90. Since there are several possible Research Hypotheses, the researcher must specify, in advance, which possibility is the more likely result of a rejection of the Null Hypothesis. When there is no specific prediction, a hypothesis such as # 3 (above) is

advanced. When the researcher has a-priori reason to expect one group to have higher (or lower) scores than the other, then hypotheses such as # 1 or # 2 are specified. The implications of such decisions pertain to the strength of evidence needed to reject the Null Hypothesis. It takes more evidence to reject the Null Hypothesis in favor of hypothesis # 3 than either # 1or # 2.

91. Consider the problem facing a researcher who tests a new drug. The clear presumption is that this new drug will do better (produce more cures) than existing drugs or therapies (i.e., Research Hypothesis: New Drug > Old drug). The null hypothesis in this case would be that the new drug does no better (on some measure) than the old strategy. This is the hypothesis that is tested statistically. If the researcher is able to reject this hypothesis (by finding sample evidence in favor of better results from the new drug), then he will conclude that the new drug probably does, in fact, do a better job.

92. This scientific practice resembles the case of an accused criminal in a court of law. The defendant is considered not guilty unless the evidence suggests beyond a reasonable doubt that he is guilty, so long as the trial was conducted fairly. A null hypothesis is considered tenable unless the evidence suggests otherwise, (beyond some reasonable doubt), so long as the test was conducted fairly. What is important to understand is that a failure to reject the Null Hypothesis, however, does not establish the absence of differences between two groups. Rather, it indicates insufficient evidence to render a verdict.

93. Just as a court pronounces a sentence of guilty or not guilty (rather than innocent), so a statistical test of the null hypothesis leads to a verdict of reject, or fail to reject (not accept).

c. Threshold Value

94. Setting up the Research and Null Hypotheses is the first step in dealing with a problem of hypothesis testing. The next step consists of devising a standard by

which a researcher will decide whether the Null Hypothesis is, or is not, to be rejected. Establishing a threshold value to distinguish the two possibilities does this. The researcher will calculate a statistic (e.g., an average) that may theoretically assume a wide range of values. Depending on the value that is obtained, the statistic either falls beyond the threshold for rejecting the Null Hypothesis, or doesn't. If it does, the researcher rejects the Null Hypothesis. If it does not, the researcher fails to reject the Null Hypothesis (note, the researcher never accepts the Null Hypothesis).

95. To establish the threshold, the researcher relies on statistical theory. Based on a probability sample of homosexual and heterosexual parents, the difference in averages between the two may take an infinite number of values. But if the null hypothesis is true, then certain values are more likely than others. Simply put, if the Null Hypothesis is, in fact, true, then the difference of averages is more likely to equal zero than it is to equal any other value. But other values are possible, even if the true difference in the population represented by this one sample is zero. Due to the vagaries of random sampling, it is conceivable that the sample difference in averages would actually be some positive or negative value even if the true population difference is zero. But it would be unlikely to be vastly different than zero if the Null Hypothesis is true.

96. Statisticians determine how unlikely it would be to find a particular result in a sample if the Null Hypothesis is true. This is how the boundary between rejecting and failing to reject the Null Hypothesis is established. If the Null Hypothesis is true, sample statistics are extremely unlikely to fall beyond the boundary and lead to rejecting the Null Hypothesis. By convention, this boundary is established so that the risk of incorrectly rejecting the Null Hypothesis when it is true is less than 5%. In sum, the Null Hypothesis is rejected when the sample evidence is convincing beyond a reasonable doubt of something less than 5% that it is true.

d. Error Types

97. The important point is that the researcher who does, in fact, reject the Null Hypothesis is always doing so at some risk of error. If the boundary is established at 5%, then the probability of rejecting the Null Hypothesis when it is actually true, and should not have been rejected, is .05 (5%). Returning to the example of an accused criminal, making this type of error is comparable to convicting an innocent person. In research, this type of error is known as Type I error.

98. In almost all articles reviewed for this case, the presumed Research Hypothesis is that the two groups do not differ. It is important to note that this is a very different type of test than is typically conducted, where the Null Hypothesis, that is, the two groups do not differ, is tested. Whenever the Research Hypothesis and Null Hypothesis are, essentially, switched as in this case, attention shifts from a Type I error to another type of error.

99. There are actually two types of possible error involved in any testing of research and null hypotheses. Suppose that the statistical evidence from the sample does not fall beyond the boundary established. In this case, the researcher does not reject the Null Hypothesis. Still, we cannot rule out the possibility that the Null Hypothesis is, in fact, false. And there will always be a certain possibility of making this type of error. Were this a criminal trial, such an error would be comparable to finding a guilty person not guilty. In research, this type of error is known as Type II error.
A researcher is able to manipulate the chances of Type I error by the selection of the boundary point. It would be possible, for example, to minimize the chances of making a Type I error (the statistical significance of a test) by establishing the boundary at a point defined by a probability of, say, .001 rather than .05. Where the boundary is set depends on the seriousness of the consequences of making an error. Were we testing a critical medical product, we would probably set a .001probability because the consequences of falsely rejecting the Null Hypothesis could be enormously important, such as putting patients on a treatment regimen that is not superior to existing protocols. But the important point about the two types of error is that by decreasing the probability of one

type of error, we increase the probability of the other type of error. The researcher who establishes a very demanding critical boundary (level of statistical significance) by setting a very low probability of Type I error thereby increases her chances of making a Type II error.

e. The Power of a Test

100. The probability of committing a Type I error is known as the level of significance. The probability of committing a Type II error is related to the "power" of a test. In the language of statistics, the lower the probability of not rejecting the Null Hypothesis when it is false, the more powerful is the test. A powerful test, that is, is less likely to err by failing to reject the hypothesis that the two groups do not differ when, in fact, they do.

101. The power of a statistical test may be compared to the power of a microscope. It reflects the ability of a statistical test to detect from evidence that the true situation differs from a hypothetical one. Just as a high-powered microscope lets us distinguish gaps in an apparently solid material that we would miss with low power or the naked eye, so does a high power test of the Null Hypothesis almost insure us of detecting when it is false. Further, just as any microscope will reveal gaps with more clarity the larger are those gaps, the larger the departure of the Null Hypothesis from the true situation specified by the Alternative Hypothesis, the more powerful is the test of the Null Hypothesis. In the case at hand, the larger the "effect" or the larger the difference between homosexual and heterosexual parents, the more powerful the test will be. If the actual difference is small, the test will be less powerful

102. The power of a statistical test is defined as

[1.0 – (probability of a Type II error)]

103. Type I and Type II errors differ in their implications. In the present case, a failure to reject the Null Hypothesis when it is false (Type II error) would lead to the

erroneous conclusion that the children of homosexual and heterosexual parents are similar when, in fact, they are different. A faulty rejection of the Null Hypothesis when it is true (Type I error), however, would lead to the incorrect conclusion that children of the two types of parents differ when, in fact, they do not. Given that policy might be formulated on the basis of the results in this particular case, it is clearly more important to minimize the chances of Type II errors than Type I errors when the Research Hypothesis, rather than the Null Hypothesis, is that the two groups do not differ.

104. For this reason, the researcher investigating the children of homosexual and heterosexual parents should accept a higher chance of Type I errors than is typically done in social science research. This will lower the chances of a Type II error. Rather than establish the boundary for rejecting the Null Hypothesis by setting .05 as the critical value, in my opinion, it would make more sense to set the level of significance for rejecting the Null Hypothesis at a higher value, perhaps .10.

105. Another way to increase the power of the statistical comparison is to increase the size of the sample. Small samples have lower power than large samples. Given the nature of the problem, that is where the Null Hypothesis of "no difference" is actually the Research Hypothesis, research on this topic requires a large sample, especially to reliably detect small differences between groups.

106. If we design our study in such a way to be powerful enough to detect rather small differences between the averages of two groups, we will need a sample of at least 400 cases to achieve Power of .80. Since Power = [1.0 - probability (Type II error)], our test runs the risk of Type II error of .20. This would mean that the researcher runs a 20% risk of failing to reject the Null Hypothesis when it is, in fact, not true.

107. In sum, given the nature of the problem being considered, in my opinion, reliable research would require an increase in the level of statistical significance required to reject the Null Hypothesis from the conventional .05 to .10. Sound research would also require an increase in the sample to at least 400 cases. And even then, the power of

the test may be inadequate if there are other factors that must be controlled (e.g., income, age, education, etc.). This is why I suggest a sample of 800 gay parents (see my earlier comments on sampling).

108. This brings me to the last point about the analysis. The skilled researcher must do everything possible to control *all* factors that might cloud the findings. The research must statistically control for all important differences between heterosexual and homosexual parents other than their sexual orientation. To do this would require the size sample just mentioned. Preliminary research might identify ten or fifteen possible factors that would need to be statistically controlled before a valid comparison of children in the two groups could be conducted.

109. What other factors must be statistically controlled? The response is *any* factor that is correlated with both the cause and the effect. In the case at hand, this would mean that anything that is related (on average) to being in a same-sex union and is also related (on average) to the health or well being of children must be controlled. Possible candidates for such factors include parents' income, parents' education, parents' emotional and psychological health (e.g., depression), relationship quality (between adult partners), and various residential variables (e.g., neighborhood quality, etc.). Also important would be the relationship history that the child has experienced (how many changes in his/her parent's partners) or whether the children have lived in a heterosexual relationship for varying portions of their lives?

110. An alternative to statistical control is achieved by matching cases. If every homosexual parent could be "matched " by a heterosexual parent on all relevant factors, this would allow the researcher to compare the two groups. Since no study, to date, has been able to do this, statistical control appears to have been the only feasible strategy that would permit a researcher to compare homosexual and heterosexual parents.

111. Before moving to a specific evaluation of the evidence offered in Professor Bigner's brief, I want to conclude this section by noting that statistical control

is particularly important in this case. It is possible for two factors to appear to be uncorrelated due to their relationship to some third factor. If this third factor is positively correlated with sexual orientation, but negatively correlated with children's well being (or vice-versa), then a failure to control it may lead to a spurious non-correlation. In short, it is essential to understand that statistical control is as necessary in the presence of a trivial or zero correlation as it is in the presence of a strong and substantively large correlation.

VII. Examination of Prof. Bigner's Affidavit.

a. Introduction

112. In this section, I set out my conclusions and analysis of my review of all evidence cited by Professor Bigner in his affidavit sworn November 15, 2000. I evaluate only published articles in professional outlets. I omit from my review all unpublished Ph.D. doctoral dissertations and materials that appeared in popular news outlets (e.g., Newsweek magazine). My review focuses solely on the scientific merit of the research. The evaluation that follows concentrates on those issues that I have discussed in the first half of my affidavit, above.

113. Specifically, I evaluate

- The scientific adequacy of the sample. Did the article rely on a probability sample of adequate size? Was there evidence of obvious sample bias?
- The operationalization of key concepts
- The adequacy of the comparison group, and
- The appropriate use of inferential (generalizing) statistics.

114. Professor Bigner's affidavit relies almost entirely on the Vermont brief included as Exhibit "B" to his affidavit. First I examine Professor Bigner's primary assertions, both in his affidavit of November 15, 2000 and in the Vermont brief (seriatim). I then review the evidence for those assertions found in the articles cited.

b. Opinion on Evidence Relied on by Professor Bigner

115. All of the articles I reviewed contained at least one fatal flaw of design or execution. Not a single one was conducted according to generally accepted standards of scientific research.

116. The studies reviewed exhibit the critical defects explained earlier, in the following ways:

- Not one study relied on probability samples of homosexuals and heterosexuals.
- The definition of "homosexual" was typically vague and poorly articulated, often no more than "self designated" or "self identified." There is no way, therefore, to know whether homosexuals who do not openly identify differ from those who do. Nor is there any way to know what "self identified" means with respect to the question at hand.
- In most cases, all data were collected by a single researcher. This makes it impossible to assess the extent of subjective bias that may have been introduced.
- Only one study relied on a longitudinal design.
- Researchers often relied on well-known and established measures, but rarely reported their reliability for the samples studied.
- The potential sources of serious bias are very clear and often acknowledged by the authors:
    - First, is the reliance on self-selected samples. When subjects are allowed to select themselves into a study without any scientific sampling used, the researcher cannot know how his or her subjects compare to those who did not select themselves into the study. This unknown bias makes it impossible to generalize the findings from any such study.
    - Second, is the fact that almost all samples of homosexuals have extremely high levels of education. In all studies reviewed (where such information

was noted), well over half of the homosexuals studied had completed college (only 23% of all adults in America have completed college)[9]

- Lastly, the researchers failed to incorporate statistical controls to deal with extraneous influences, even when their research revealed notable differences between their samples of homosexual and heterosexual subjects on such dimensions.

- Response rates, where noted, were typically low.
- Sample sizes were almost always too small to provide the statistical power needed to confidently fail to reject the hypothesis of 'no differences' between groups.

117. This last point should be stressed. The researchers typically found "no differences" between their homosexual and heterosexual subjects. The tests that were conducted (even though inappropriate) relied on samples too small to allow the researcher to make this conclusion without risking a very high probability of error. 118. Stated most simply, the articles cited in Professor Bigner's affidavit did not rely on samples of sufficient size to provide the statistical power needed to reach the conclusions they did.

119. My conclusion, based on the analysis that follows, is that we simply do not yet know how the children of homosexual and heterosexual parents compare at this point in time. To know this, we would need to conduct the type of project I outlined in the first half of my comments. Such a study is not a particularly large undertaking. There are many examples of social science projects that are more complex and challenging than this one would be. However, based on the studies reviewed and my own search of the literature, this research has not yet been done. Given the potential consequences of an incorrect conclusion, such research seems warranted before any body, legislatures or courts, come to any conclusion about domestic arrangements with unknown consequences for children.

[9] http://www.census.gov/prod/2/pop/p20/p20-489.pdf

120. The final portion of Professor Bigner's affidavit is aimed at supporting a hypothetical argument about the benefits of legal marriage for children of same-sex couples. I am familiar with this literature and stipulate that, with few exceptions, [10] it conforms to the standards of acceptable scientific research that I established at the outset of my comments.

121. I believe it is true, as Professor Bigner claims in his paragraph 14, that, at least with respect to heterosexual couples:

1) Children benefit from living in a healthy, loving home with both parents in the context of a healthy, happy intact family;
2) civil marriage, and the protections, supports, and obligations that accompany that status, can fortify committed relationships between parents;
3) the community and social supports that accompany civil marriage, including enhancing the strength of relationship between spouses, can promote even better parenting.

122. The problem, in my opinion, is that there is an important, yet unanswered, question about the benefits of marriage. While it is generally true that marriage confers numerous advantages, it is unknown whether those advantages are the result of marriage, per se, or heterosexual marriage. To assume, as Professor Bigner does, that marriage has the same consequences *regardless* of the sexual orientation of the parents is pure speculation. We simply have no basis, at this point, on which to make an assumption that legal recognition of the relationships such as same-sex marriages, would eliminate the social prejudice or stigma associated with homosexuality.

123. Professor Bigner concludes, at paragraph 15, that the evidence reviewed establishes the claim: "where children of gay and lesbian parents may have difficulties, those difficulties stem from the lack of social and legal support for their family structures rather than any intrinsic shortcoming of the family structure itself. To the extent that

[10] Blumstein and Schwartz, 1983; Grissett and Furr,1994; Solomon and Rothblum, 1986; Crockenberg (1982).

some children may experience difficulties as a result of societal reactions to their lesbian mothers or gay fathers, those difficulties could only be alleviated by legal recognition of those family structures."

124. My opinion, based on my own reading of the literature, is that, undoubtedly, teasing, ostracism, or other forms of social prejudice are a large part of the story of the lives of children living with gay or lesbian parents. But equally pertinent are any other factors inherent in the family relationships of same-sex partners, at least to the extent that the evidence is cited by Professor Bigner. Qualitative research referred to by Professor Bigner addresses this point clearly (Blumstein and Schwartz, 1983). Surely, the question that should be asked is whether same-sex partners have different rates of break-ups than opposite sex cohabiting (unmarried) parents.

125. If, for example, gays and/or lesbian relationships exhibited higher rates of break-up than unmarried or married heterosexual relationships, this should be known and investigated, for this factor may have effects on children. The point, however, is that this aspect has not yet been addressed. More generally, to assert that the only difficulties faced by the children of gay and lesbian parents are the result of social forces (prejudice, etc.) and not any factors related to the particular family structure, presumes that we have tested this basic idea. In my view, the accumulated evidence does not speak to this issue. If, indeed, sound scientific research were to confirm the closing assertions made by Professor Bigner, I would be pleased to agree with his opinion. In my own professional opinion, however, such research remains to be conducted and the issues remain unresolved.

c. Analysis

126. Before addressing the issue of how children of gay and lesbian parents compare with those of heterosexual parents, Professor Bigner offers several preliminary assertions that have no proper foundation in the scientific research he relies on. While these claims may very well be true, the issue is simply whether they are supported

scientifically by the studies Professor Bigner relies on to make those claims. In my analysis, I address these claims by examining each of the studies cited by Professor Bigner and describing the crucial weaknesses the studies display.

127. The preliminary assertions made by Professor Bigner are:

1) About one third of lesbians and about 10% of gay men are parents.
2) Increasing numbers of lesbian and gay couples are rearing their own children.
3) The reasons why gay men and lesbian women become parents are no different from those motivations that prompt heterosexual men and women to become parents.
4) Gay and lesbian parents possess parenting skills and abilities comparable to their heterosexual counterparts

128. With respect to the first and second assertions, there are two primary sources cited: Bell (1978) and Patterson (1992). The first of these studies did not attempt to estimate the prevalence of homosexuals and the second relied on the claims of others who make the assertion that it is cited for by Professor Bigner. All of the sources cited from the Vermont Brief on this issue either did not conduct the research to make the claim, or did not claim, that the number of gay and lesbian parents is increasing. My conclusion is that none of the sources cited by Professor Bigner contains evidence about the prevalence of homosexuality, or the change in prevalence. None of the studies makes any claims about such matters (except to quote others who make such claims without evidence). In short, there is absolutely no evidence about how many homosexual parents there are, nor whether their numbers are increasing or decreasing. I have reached this opinion based on my detailed examination of each of the studies, as described in Appendix III to this affidavit

129. The third assertion, regarding the reasons gay and lesbian men and women decide to become parents, is held to be supported by a number of studies authored by Professor Bigner himself, in collaboration with others. The first two studies, Bigner and Jacobsen (1989b; 1989a) suffer from the inappropriate application of statistical

techniques, the failure to control for extraneous factors, poor sample size, and inadequate sample, among other flaws, making it impossible to draw general conclusions from this research. In the third study, Siegenthalor and Bigner, (2000), the authors claim their research found that the reasons heterosexuals and homosexuals become parents are, indeed, different, in direct contrast to the assertion for which this article is cited. In my opinion, none of the studies reported for this assertion is sound enough methodologically to permit the claim to be made. The details of my analysis of the studies referred to is contained in Appendix IV to this affidavit.

130. The last assertion, that gay and lesbian parents have the same parenting skills as heterosexual parents, is another one we might like to assume. However, Professor Bigner's claim is that this assertion is scientifically supported by the studies cited for it. In my opinion, the collection of these sources cited about lesbian mothers is inadequate to permit any conclusions to be drawn. None had a probability sample. All used inappropriate statistics given the samples obtained. All had biased samples. Sample sizes were consistently small, and in almost all cases inadequate to permit the researchers to draw conclusions about their failure to reject the null hypothesis (even when not stated, the presumption in all these studies is that there are no significant differences between the groups). And despite the use of good measures in many cases, there was no way to ascertain how the researchers insured that their samples of "lesbians" satisfied any definition of that term, nor of whether the samples of heterosexuals were, in fact, heterosexuals. There is no way to generalize the results of these studies beyond the peculiar and unusual samples used in them. I do not believe this collection of articles indicates that lesbian and heterosexual mothers are similar.

131. In respect of gay men, the last assertion exhibits the same frailties if, as Bigner claims, the studies cited are considered scientific support for the claim made. In sum, the evidence contained in the Vermont brief, in regards to the parenting behaviors of gay men, rests on three studies that are all based on non-probability samples of a size that is inadequate to provide the power needed to fairly test the hypotheses involved. Other problems noted for the individual studies in Appendix V, also render their conclusions

questionable. I do not believe these articles offer the support claimed for the assertion made about the parenting skills of gay men. In fact, from a scientific perspective, the evidence confirms nothing about the quality of gay parents.

d. Principal Assertions

132. Professor Bigner makes several principal assertions that form the core of his opinion. The first is that the children of gay and lesbian or same-sex parents are as well adjusted as those of their counterparts who have heterosexual or different sex parents. Further, Professor Bigner makes the claim that the evidence also indicates that there are no differences between the children of gay parents and the children of heterosexual parents in terms of gender identity or sexual orientation, based on the studies presented in the Vermont Brief.

133. Professor Bigner says that the first assertion is supported by approximately 50 published studies, including a meta-analysis of 18 studies previously published on the subject of the impact of homosexual and heterosexual parents on children (Allen and Burrell, 1996) . Many of the articles included in the meta-analysis are ones that I reviewed for earlier portions of this affidavit.

134. Meta analysis is a statistical method used to combine comparable studies when each, by itself, has inadequate sample sizes to provide needed power. The meta-analysis is able to provide more power by combining the results of many smaller studies (thereby producing a larger sample). The process of selecting appropriate studies and coding their information is fraught with its own biases and pitfalls. When the original cases are properly evaluated for quality, and weighted accordingly, such an analysis is able to correct for small samples so long as the other requirements for inferential statistics were satisfied. In the present meta-analysis, the studies that were combined suffered from the flaws already noted. As such, combining many poorly done studies, each of which has peculiar non-probability samples and unknown biases, cannot and does not provide any greater evidence than the individual studies do, taken separately.

135. In Appendix VI to this affidavit I have set out my comments resulting from my detailed analysis of each study cited in support of Professor Bigner's principal assertions. The conclusion can be summarized very succinctly: all of these studies exhibit flaws that make the conclusions drawn by Professor Bigner unsupportable. However, considering that Professor Bigner's main assertion is made from these studies, I thought it would be helpful to include in the body of this affidavit a detailed analysis of the study that I view as one of the most rigorous studies among all those reviewed: Golombok and Tasker (1996).

136. My view that these authors conducted one of most rigorous studies is because they employed a longitudinal design. A non-probability sample of 27 self-selected lesbian mothers and their 39 children, and a control group of 27 self-selected heterosexual single mothers and their 39 children were first studied in 1976-1977 when the average age of the children was approximately 10 years. Subjects were recruited with advertisements in lesbian and single-parent publications and contacts with lesbian and single parent organizations. "Lesbian" was defined as a women who regarded herself as wholly or predominately lesbian in her sexual orientation. The definition of "heterosexual" was behavioral. Members of the control group had their most recent sexual relationship with a man. Importantly, all children in the study were conceived and born into heterosexual relationships.

137. In 1992-1993 when the children were about 24 years old, they were seen again. Of the original 54 mothers, 51 were traced. This produced an effective pool of 37 of the children of lesbians. Of these, 25 were interviewed (68%). 21 of 39 children of heterosexual mothers (54%) were also interviewed. The two groups were compared and found to be similar in terms of education, age, gender, or ethnicity. The authors investigated the reasons for panel attrition (drop outs between waves). The only notable difference between groups in attrition was that lesbians in relationships high in conflict were less likely to remain in the panel.

138. The instrumentation is described in detail. Reliability of measures, and inter-rater reliability of raters are reported. Although this study is strong, it still suffered from the weakness that no statistical controls were employed to compensate for extraneous factors.

139. Findings indicated that at least one difference existed between the two groups of children, contrary to the assertion that the study is supposed to support. The children raised by lesbians were more likely to have experienced a same-sex sexual relationship than young adults raised by heterosexual mothers (though this appeared most true for sons rather than daughters.). This may or may not be a true difference due to the additional weaknesses identified in the sampling (i.e. non-probability and self-selection).

140. In sum, all the articles offered by Professor Bigner, including the study considered the most rigorous, cannot be taken as establishing the claim that scientific research shows no differences between the children of gay parents and the children of heterosexual parents in terms of gender identity or sexual orientation.

141. Professor Bigner is correct to state that the "weight of published evidence" suggests that this is so. From a sound methodological perspective, the results of these studies can be relied on for one purpose – to indicate that further research regarding his hypothesis is warranted. However, in my opinion, the only acceptable conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence.

VIII. Appendices

APPENDIX I

Simple Random Sampling

A simple way to envision simple Random Sampling (SRS) is to imagine writing the names of each member of some population on a card. Suppose there are 500 individuals in the population and we want a sample of 50. There would be 500 cards, each with a name on it. If all 500 cards were placed in a large box and shuffled, we could draw the first card with assurance that it has no greater or lesser chance of being drawn than any other card in the box. The chance of drawing this one name is simply 1/500. Once we draw the first case, we write the name of the person on a sheet, and place the card back into the box. It is essential that the card be returned to the box. If we did not return the card to the box, then the next name drawn would have a 1/499 chance of selection because there would only be 499 cards remaining in the box. Since 1/499 does not equal 1/500, we would have violated the primary assumption of SRS. Following in this manner, we would continue drawing a card, writing the name down, returning the card to the box, and drawing another name until we had our desired 50 cases (returning any name that has already been drawn before). At this point, we would have a pure random sample. Any results based on these 50 cases could be generalized with reasonable assurance to the entire population of 500 using standard statistical techniques.

Researchers do not, of course, use a box of cards to assemble their random samples. Rather, computer software is used to select a random sample of cases, or generate a list of random numbers. Alternatively, samples may be selected by systematically drawing every Nth case from a list (e.g., taking every 10th case from a list of 1,000 to produce a systematic random sample of 100).

In practice, researchers are sometimes unable to assemble an accurate list of all members of the population. This is true, for example, when sampling all adults in the United

States, all children in public schools, or all patients with diagnosed breast cancer. In such cases, alternative strategies are used to approximate a random sample. One common strategy is to randomly sample geographic or organizational units. For example, a researcher might randomly sample 100 U.S. Census tracts. Then, within each randomly selected Census tract, the researcher might randomly select 5 Census blocks. Within each randomly selected Census block, the researcher might randomly select 2 households. Within each randomly selected household, the researcher would interview one randomly selected individual. In all, this strategy would produce 100 X 5 X 2 = 1,000 individuals randomly selected from a total population defined as all households in U.S. Census tracts (approximately 100% of all U.S. households). A sampling statistician would calculate appropriate weights to be applied at each stage of this multi-stage sampling strategy to produce a final sample of 1,000 cases that can be treated as a random sample. A comparable strategy could be used with hospitals, schools, churches, or clubs as the initial sampling units.

APPENDIX II

The Classic Experiment

In a classic experiment, the researcher assembles a representative sample of cases and randomly assigns them to one of two groups. The 'experimental' group and the 'control' group, that is, are determined purely by chance (e.g., flipping a coin). Since there is nothing but random chance to determine which group a case ends up in, there is no logical way for the two groups to differ. Random assignment will place as many rich as poor individuals in each group, as many white or Hispanic individuals into each group, and so on. The researcher administers a test at the outset of the study to verify that the experimental and control groups do not differ. Then the researcher administers some treatment or stimulus to the experimental group that is not administered to the control group. At this point, the two groups differ only with respect to the treatment or stimulus. Logically, the two groups do not differ on any other dimension. The researcher then administers the test again. Any difference that is now found between the two groups may logically be attributed to the treatment or stimulus because it is the only thing that distinguishes the groups. (In actual practice, there are well known problems with experiments that may threaten the similarity of groups on all matters except the treatment/stimulus. These threats are dealt with by more complex experimental designs than the one just outlined)

The classic experiment comes as close as one can come to satisfying all three conditions for establishing a cause-effect relationship. And the reason it does is because it relies on random assignment of cases into the various groups to be compared. Random assignment essentially assures the researcher than all "other factors" that might confound the results are distributed evenly – one group has as many or as few as the other.

APPENDIX III

Detailed analysis of Studies Respecting Claims About Prevalence of Homosexuality and Homosexual Parents

Bell (1978)

This study of homosexuals in San Francisco, CA. is elaborate and well conceived. However, the researchers did not attempt to estimate the prevalence of homosexuality in either San Francisco or the nation. Nor is there any attempt to measure change in the homosexual population over time. The research team recruited (through self-selection) a large sample of homosexuals by distributing recruitment cards in various locations and asking respondents to volunteer to be in the study (paid advertisements, gay bars, personal contacts, gay baths, homophile organizations, private bars, public restrooms, hotels, restaurants, etc.) A heterosexual sample was obtained by probability methods developed and applied by the National Opinion Research Center. Detailed and carefully executed statistical analyses were performed, but the failings regarding prevalence and change are significant.

Patterson (1992)

This study does not make the claim Bigner attributes to its author, nor does the author offer any original research on this issue. Rather, she refers to others' claims. According to Patterson "How many children of gay and/or lesbian parents live in the United States today? No accurate answer to this question is available. ... According to large-scale survey studies, about 10% of gay, and about 20% of lesbians are parents" (1992: 1026, and footnote 1).

Evidence from the Vermont Brief:

Patterson (1994).

The researcher studied 27 lesbian couples, 7 single mothers, and 4 separated lesbian mothers. She made no claims, nor conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Pies (1990).

The author neither conducted, nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Rafkin (1990).

The author neither conducted, nor claimed to have conducted, any research in support of the assertion that the number of gay or lesbian parents is increasing.

Steckel (1987).

The author neither conducted, nor claimed to have conducted, any research in support of the assertion that the number of gay or lesbian parents is increasing.

Tasker and Golombok (1997).

The authors state in their second paragraph "It is not known how many lesbian mothers there are." (p 1). The researchers conducted a longitudinal study of 27 lesbian and 27 heterosexual single mothers. This research will be discussed in a later section. The authors neither conducted, nor claimed to have conducted, any research in support of the assertion that the number of gay or lesbian parents is increasing.

Supplementary Studies:

Bigner supplements the sources cited in the Vermont Brief with the following:

Faderman (1984)

The author of this article describes the homosexual identity formation process for lesbians. The article is based on a review of existing literature. There is no original research conducted nor reported.

Green and Bozett (1991).

The authors neither conducted, nor claimed to have conducted any original research. The authors state "Because homosexuals are an invisible population, accurate statistics on the number of gay fathers and lesbian mothers are impossible to obtain. However, based on the belief that 10% of the male population is gay, and that 20% of the gay male population has married at least once, and that 25% to 50% of this 20% have had children, the number of gay fathers in this country is likely more than two million. Add to this estimate the 6% to 7% of the female population is lesbian, and that between 1.5 and 3.3 million of them are mothers, the current estimates of children of gay fathers and lesbian mothers range between 5 million and 14 million" (198) (I omit the sources cited by the authors for these figures)

The estimates of gay fathers provided by Green and Bozett work out as follows. The lower bound estimate is 10% X 20% X 25% = 0.5% of adult males are gay fathers. The upper bound estimate is 10% X 20% X 50% = 1.0% of adult males are gay fathers. In 1990, when this article was published, there were approximately 84.5 million U.S. males over the age of 19[11]. Applying the authors' estimates, we arrive at between 422,500 and 845,000 adult gay fathers. Neither figure suggests more than 2 million such parents. (The same U.S. Census showed that there were 92.5 million females over the age of 19.

[11] http://www.census.gov/prod/1/gen/95statab/pop.pdf

If between 1.5 and 3.3 million of them are lesbian mothers, then between 1.6% and 3.6% of all adult females are lesbian mothers, not the 6% to 7% claimed by the author.

Flaks (1995).

The author neither conducted, nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Golombok, Tasker, and Murray (1997).

The researchers conducted an innovative project with some significant strengths. The objective was to investigate family functioning and the psychological development of children raised in fatherless families from their first year of life. The researchers assembled a non-probability sample of 30 self-selected lesbian mothers who "volunteered" for this project. They also assembled a non-probability sample of 42 heterosexual single mother "volunteers." Finally, they draw what appears to have been a probability sample of 42 heterosexual families from maternity records. The groups to be compared differed as one would expect when relying on volunteer subjects. There were significant differences in age of the mother, social class of the mother, and number of children among the groups to be compared. The authors relied on very good measures of family functioning and psychological development. Overall, the execution of the study was good (though it is not known how inter-rater reliabilities were established). There is no definition of "lesbian" or "heterosexual" provided by the researchers. Nor is there any indication of how these terms were applied to the subjects.

The authors statistically controlled for the differences among groups in mother's age, social class, and number of children in the family. Their results showed that single mothers showed greater warmth and interacted more with their child, but also reported more serious disputes. Children being reared without a father were found to be more securely attached to their mother, but perceived themselves to be less cognitively and physically competent than their peers from father-present families. Differences between lesbian and heterosexual single mothers were found only in the amount of interaction

between parent and child. Lesbian mothers interacted more frequently with their child than did heterosexual single mothers.

The sample sizes were too small to provide the statistical power needed to reliably detect no difference among groups given the statistical methods used. The reliance on "volunteer" subjects makes it impossible to estimate the biases that lead some people, but not others to volunteer for research projects. Though the authors discovered (and statistically controlled) for differences in several demographic factors, there is no way to know what other differences may also have existed, but were not discovered for failure to measure them. This is a well-done exploratory study. It's results cannot, however, be generalized beyond the peculiar samples used in the research. There is no estimate of the number of lesbian couples, nor whether their number is changing.

Hoeffer (1981).

The researcher studied 20 lesbian and 20 heterosexual single mothers who resided in San Francisco I will discuss this research later. The author neither conducted nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Bozett (1981).

The author conducted interviews with 18 homosexual fathers in San Francisco. The author neither conducted nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Moses and Hawkins (1982)

Professor Bigner provides no citation for this reference other than the last names and date of publication. I could not locate the article in question.

Tasker, and Golombok (1995)

The authors report the results of a longitudinal study of 25 adults from lesbian families and 21 adults from heterosexual single mother families. They make no claims about the number of such families, their growth or decline, nor do they conduct or report any research relating to such claims.

Muzio (1996)

The author, a therapist, discussed one case in particular, and several others more generally in her advice to therapists treating lesbian mothers. The author notes: "Because individuals and families often seek therapy when their lived experiences contradict the dominant narrative about them, it is not unusual for lesbians to seek therapy at some point in their family building process (p. 367). This article is intended to provide advice to therapists when this happens. There is no research protocol, analysis, or comparison group involved. This is not a research article. The author makes no claims about the number of same-sex parents, or whether such numbers are changing.

Bailey, Bobrow, Wolfe, and Mikach (1995).

The authors neither conducted nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing

Bigner (1996).

The author reviews the literature to provide guidance to therapists with gay father clients. There is no research conducted nor reported in this article.

Ricketts and Achtenberg (1990).

The case studies offered by these authors are not presented in support of the claim that the number of gay and lesbian parents is increasing.

APPENDIX IV

Gay And Lesbian Parents Have the Same Motives for Becoming Parents

Bigner and Jacobsen (1989b).

The researchers rely on two samples obtained by different methods. Neither is a probability sample according to the authors. The sample of homosexual fathers was obtained from solicitations to a support group for gay fathers in Denver. The comparison group was selected from another project conducted by the senior author. The response rate for the homosexual sample was approximately 50%. There is no reported response rate for the sample of heterosexual fathers. The heterosexual fathers selected for this study were matched on age, martial status, income, ethnic identity, and education. No summary statistics are provided that would allow a comparison of the two groups on such measures. Subjects were mailed a questionnaire in most cases, though some subjects completed their questionnaires at conferences or workshops. The author acknowledges that the two samples were gathered under different conditions.

There is no operational definition of "gay." The comparison (heterosexual) sample is described as "presumed heterosexuals" because of the absence of such a definition. The researchers relied on good measures of parental behavior. The application of interferential statistics is not permitted with such a sample. The results of those statistical comparisons, however, reveal statistically significant differences between the two groups of fathers on several measures of parental behavior (limit setting, responsiveness, and reasoning/guidance).

The authors admit that the samples are biased due to high incomes. The authors also admit that the results cannot be generalized. "The sample of gay fathers is unlikely to be an accurate representation of gay fathers in the general population (p. 184). Other likely

biases are the result of different methods of recruiting the two samples, and different methods of administering the questionnaires.

Bigner and Jacobsen (1989a)

The authors rely on the same sample described above. In this article, the concern is how fathers responded to a measure referred to as the "Value of Children" questionnaire. Details of this questionnaire are not provided. Additionally, the same limitations that were described above apply to this study.

Siegenthalor and Bigner (2000)

Rather than report that there are no differences between the two groups in their motives for becoming children, the authors of this article actually report that lesbian and non-lesbian mothers differ only in their motives for becoming parents. They are not found (in the research reported) to differ in the value they place on parenthood (i.e., the satisfaction, the happiness, social status, or other benefits they derive from parenthood once children arrive) (p 84).

The authors assembled a non-probability sample of 25 self-selected lesbian and 25 self-selected non-lesbian mothers. The researchers recruited lesbians from lesbian support groups. They recruited the non-lesbians from other "parent support groups." Due to restrictions imposed by the IRB (Institutional Review Board for the Protection of Human Subjects), the researchers were unable to inquire about the sexual orientation of their subjects (p 82). As a result, they were unable to develop a definition of "homosexual" or "heterosexual" nor were they able to insure that subjects in each group met any definition of those terms. The two self-selected groups were matched on age, education, and income. Subjects rated the value of children on various dimensions. The scale used for this purpose has good reliability in repeated studies of heterosexual parents. Findings showed that lesbians differ from the non-lesbian parents in why they became parents. Lesbians were reported to be less likely to agree that "Having children gives a person a special incentive to succeed in life," "One of the highest purposes in life is to have

children," and "Having children makes a stronger bond between partners." (p 85). The use of volunteer samples, the inability to impose statistical controls to compensate for extraneous factors, and the very low power of the statistical tests make it impossible to generalize the findings of this research beyond the peculiar samples used.

APPENDIX V

Gay and Lesbian Parents Parenting Skills

Cases cited from the Vermont Brief

Green and Bozett (1991).

This is the source for the claim that "The home environments of lesbian and gay persons have been found to be as moral and as physically and psychologically healthy as those of non gays." (Vermont point 2). The authors of this (admittedly) ideological chapter neither conducted, nor claimed to have conducted, any research in support of the assertion that homosexual parents are as capable and caring as heterosexual parents. The chapter is a review of research by other authors.

Lesbian women as mothers:

Green, Mandel, Hotvedt, Gray, and Smith (1986).

These researchers relied on multiple methods. Mothers completed a self-administered questionnaire, and an interview was conducted with their children. The authors assembled two samples, neither of which is a probability sample. It is not known how many interviewers were involved, or whether inter-rater reliability was established. The first sample consisted of 50 lesbian mothers and their 56 children aged 3 to 11. The lesbian mothers were recruited through national and women's groups and through snowball sampling. The heterosexual sample was recruited through requests "for single-mother subjects" (no further details are provided). No operational definition of the term "lesbian" or "heterosexual" is provided except that lesbians were required to be "self identified" as such. . The authors administered good measures of personality and intelligence. Children were also interviewed about their peer groups, play preferences, and thoughts about life.

Inferential statistics are applied despite the fact that the samples are not probability samples. Both samples are (admittedly) biased. Though no comparison statistics (for each group) are provided, almost all subjects (86%) had completed college. There is no way to estimate the possible bias introduced by such high levels of education, nor of relying on members of women's groups. Nor are such groups described to permit the reader to assess the nature of the groups used for this project. But the authors note that 78% of the lesbians, but only 10% of the heterosexual mothers had partners living in the household. Clearly, even if no other differences existed, this simple and enormous difference invalidates any comparison between the groups without appropriate statistical controls. Such controls were not applied. The authors do not report the statistical results of their multivariate analyses, though they mention them.

Rand, Graham, and Rawlings(1982)

This research relied on a snowball sample of 25 self-selected lesbian mothers. There is no operational definition of lesbian except "self-identified." Of the 25 subjects, all but 9 had completed college, and 5 had graduate degrees. One of the measures used is highly regarded as a reliable indicator of psychological health. The other ("the affectometer") is reported to have very high reliability. The researchers compare their biased sample to national norms obtained from average samples. There was no comparison group. The most likely sources of bias are the extremely high level of education, and the fact that "all but two of the women in the present study had some degree of involvement in a lesbian community" (p 35). The authors acknowledge the bias introduced by using a snowball sample when they state "If more isolated lesbian mothers could have been included in the sample, correlations would probably have been significant." (p 35). I am unwilling to draw an conclusions from this research.

Flaks, Fisher, Masterpasqua, and Joseph (1995)

The authors rely on two non-probability samples. 15 "self identified" self-selected lesbian couples with children aged 3 to 9, and 15 heterosexual self-selected families were obtained by placing ads in lesbian newsletters, women's organizations, gay and lesbian

parenting groups, snowball sampling, and recruiting from a lesbian-mother support group. The heterosexual sample was a snowball sample. The authors used established measures with known reliability. Mothers were interviewed, in person, (it is not reported how many interviewers were involved) and reported about their children. Teachers also provided information about the children. There is no mention of response rates, and no way to calculate them from the information provided. Rather, all subjects were self-selected into the research.

The authors acknowledge the bias in their samples when they report that both groups of children (from "self identified lesbians" and presumed "heterosexual" families) differed significantly from national norms established for some of their measures. In fact, both groups of children scored higher than average on a measure of problem behaviors. As the authors acknowledge "The lesbian and heterosexual parent families studied here did not constitute random samples, and it is impossible to know what biases, if any, may have resulted as a consequence... We defined a precise and limited experimental group (i.e., lesbians)... Although the resulting sample was predominately White, highly educated, and economically privileged..."(p. 113). Indeed, 10 of the 15 lesbian mothers had graduate degrees, as did 9 of the 15 heterosexual mothers. The results of this research may not be taken as evidence in support of the assertion for which it is cited.

Miller, Jacobsen, and Bigner ((1981)

The authors rely on two non-probability samples. The lesbian sample consists of 34 self-selected mothers with custody who fit the operational definition of lesbian, i.e.,. "a woman psychologically, emotionally, and sexually attracted to another woman." (p 30). How this definition was applied is not explained. The authors refer to the sampling strategy as a "convenience sample" recruited through a feminist recreation center. The heterosexual sample was a convenience sample consisted of 47 mothers contacted at several Parent-Teacher Association meetings. Subjects completed a self-administered questionnaire, and responded to a slide show. The author notes that there was 100% inter-rater agreement in evaluating responses to the slides. All but two of the lesbians had completed college (94%). By comparison, 78% of the heterosexual subjects were

college graduates. The authors applied inferential statistics despite the samples. The author admits to no limitations on the data or the inferences drawn from them. To boost the power of the statistical tests, the authors increased the probability of a Type I error to .10 rather than .05. No statistical controls were conducted to compensate for differences between the samples. The very high level of education (especially among the lesbian sample) is one potential source of bias. The sampling methods, of course, are the most obvious problem. The results may not be generalized. This article cannot be taken as scientific evidence in support of the assertion for which it is cited.

Mucklow and Phelan (1979).

The authors describe this research as a pilot study. A purposive self-selected sample of 34 lesbian and 46 traditional mothers was located in the Denver-Fort Collins area. No details are provided on how these individuals were recruited. A lesbian mother is defined as a woman who is "psychologically, emotionally, and sexually attracted and interested in other women and who, from a previous relationship with a man, had conceived a child; or as a partner in a lesbian love relationship shared the parental role to a child" (881). The authors do not report how this definition was applied (i.e., how it was verified that all these criteria were satisfied). Members of the PTA were recruited for the heterosexual sample. No operational definition of "heterosexual" is described. One measure is reported to have high reliability. The other is reported to have low reliability. There is no way to assess the potential magnitude of bias introduced by the sampling strategies. Nor is it possible to compare the two groups on education, income, or any other measure except the two administered by the researchers. In the absence of any information about the sampling strategy, the results of this study are properly considered preliminary (a pilot study) and cannot be generalized beyond the peculiar samples used.

Lewin and Lyons (1982)

The authors assembled two non-probability, convenience samples. The first consisted of 43 self-selected divorced lesbian mothers and 37 self-selected divorced heterosexual mothers. The authors argue that there is no way to obtain representative samples of

lesbians. "obtaining a statistically representative sample of the lesbian mothers is not a realistic goal." (257). The authors recruited subjects through personal and professional referrals (snowball sampling), through publicity carried out in the local media, feminist and women's publications, newsletters published by child care and single-parent organizations, and posters. No statistical (quantitative) analysis is reported or conducted. The sample was quite biased with respect to education. Only 14% of the (combined) samples had educational levels lower than "some college." In-person, depth interviews were conducted. No report is made of the number of interviewers, nor of attempts to estimate inter-rater reliabilities. In the absence of information about the sample, the ratings of interviews, or any quantitative analysis, this study must be regarded as inadequate for purposes of the assertion it is cited to support.

Lyons (1982).

This study uses the same sample and methods described above.

Kweskin and Cook (1982).

These researchers assembled two non-probability samples by "purposive" (i.e., self-selected) means. There is no mention of how the sample of 22 lesbian mothers was recruited. The 22 heterosexual mothers were recruited from Parents Without Partners. The authors used versions of a well-known and reliable measure of gender role preferences (i.e., masculinity/femininity). Subjects completed a self-administered mailed questionnaire. No mention of the response rate is made. Without additional information about how the lesbian sample was recruited, or how the term "lesbian" was defined, it is impossible to determine the magnitude of any sampling bias. Without information about response rates, it is impossible to determine the magnitude of self-selection, even in these purposive samples.

Falk (1989)

The researcher neither conducted, nor claimed to have conducted any research in support of the assertion about lesbian mother.

Harris and Turner (1985/86)

The researchers assembled two non-probability samples. The sample of self-selected gay parents included 10 "self-described gay males, and 13 lesbian females. The sample of self-selected heterosexual parents included 2 heterosexual male single parents, and 14 heterosexual female single parents. Subjects were recruited by posters on campus and in a gay bar, advertisements in local newspapers, and an article in a gay/lesbian newsletter. Subjects were instructed to pick up questionnaires at designated locations. In addition, visits were made to meetings of a campus gay/lesbian organization, a convention of a gay/lesbian church, a Parents without Partners meeting, and several day care centers. No details are provided about the instrumentation, or reliability. It is impossible to establish response rates with samples generated by self-referral. 78% of the homosexual sample, and 87% of the heterosexual sample had college degrees. The authors do not present descriptive statistics for the heterosexual sample though they do for the homosexual sample. The sampling design makes it impossible to determine the magnitude of likely bias, though the very high levels of education are surely problematic. The authors acknowledge that their study is not representative of either gay or heterosexual parents "Thus, all generalizations must be viewed with caution." (p. 111). The sampling methods and the sample sizes were inadequate for the statistical methods used (p. 112). The results of this study do not support the assertion for which it is cited.

Lott-Whitehead and Tully (1993)

The researchers assembled a snowball sample of self-selected lesbians by using "friendship networks, word-of-mouth referrals, etc." (p 268). There was no comparison group. 187 questionnaires were distributed, of which 46 were returned (response rate = 25%). The primary method of analysis was qualitative rather than statistical. Of the 46 subjects, only 2 had less than a college education. The authors acknowledge that the research "had inherent in its design methodological flaws consistent with other similar studies…This study does not purport to contain a representative sample, and thus generalizability cannot be assumed" (p 269). In light of the very low response rate, the education bias, the lack of detail about the instrumentation, and the acknowledged flaws

in design, the results of this study cannot be used to assess the assertion for which it is cited.

Gay Men as Fathers:

The following articles are cited in support of the assertion that "Research focusing on parenting skills and attitudes of gay fathers similarly confirms that gay men are suitable, and indeed, admirable parents." (Vermont Brief).

Bozett (1989)

This is a review of the literature. The author neither conducted, nor claimed to have conducted research regarding the role of gay men as fathers.

Bigner and Jacobsen (1992).

The researchers assembled two non-probability samples. The gay sample consisted of 24 self-selected men recruited from a gay father support group. The heterosexual sample consisted of 29 self-selected fathers recruited from members of Parents without Partners. There are no statistical results presented for the substantive comparisons of the two groups. There is no operational definition of "gay" except "self identified. gay". The comparison group, therefore, was "presumed to be non-gay." (p. 103). The instrumentation consisted of slides to which men responded and a series of attitude questions. No evidence on reliability is provided. The sample size is too small to provide the power necessary for the test of the null hypothesis. I could find no evidence that the researchers controlled statistically for extraneous factors. All measurements appear to have been made by a single member of the research team, so inter-rater reliability is irrelevant. The two groups of subjects differed noticeably on educational attainment. Only 10% of the heterosexual sample had college or advanced degrees, compared with 67% of the homosexual sample. The likely sources of bias include the use of a single interviewer without attempts to establish reliability, the obvious differences in the two samples that are not dealt with by introducing statistical controls, and the unknown reliability of the instruments.

Bigner and Jacobsen (1989b)

This study was reviewed and critiqued earlier.

Scallenn (1981)

This is an unpublished Ph.D. dissertation that was not reviewed for this brief.

Harris and Turner (1985/86).

This article was reviewed and critiqued earlier.

APPENDIX VI

The Children of Gay and Lesbian Parents are as Well Adjusted as Those of Their Heterosexual Counterparts.

Patterson (1992)

The researcher assembled one non-probability sample of 37 families (26 lesbian couples, 7 single lesbian mothers, and 4 separated/divorced lesbians – some of whom had partners) producing 66 self-selected lesbian subjects. All but four subjects were employed, and 44 of the 66 had at least a college education. All children in the families were born, or adopted by lesbians, and therefore had grown up for their entire lives in such families. This design minimizes the inherent biases that would be present in studies that focus on children (of gay or lesbian parents) who were born in heterosexual relationships (as in almost all studies cited thus far). Sampling was by snowball methods. Of 39 families contacted, 37 agreed to participate. There was no comparison group. Instead, the researcher compared the children in such families to national norms established for the reliable measures used to assess children's well being. There is no report about how many researchers participated in the collection of information in face-to-face encounters in the subject's home. No statistical controls were applied to compensate for extraneous factors, though such controls would have been of little value absent a comparison group. In the end, findings about how the children from these affluent, self-selected lesbian families compare with national norms is of little statistical value because national norms are established on average, heterogeneous samples very unlike the sample used in the current study.

Patterson and Redding (1996)

This is a review of family laws relevant to lesbian and gay parents. The researchers neither conduct, nor claim to conduct any research pertaining to the parental abilities of homosexuals.

Bigner and Bozett (1990)
This is a review of the literature on gay parents. The researchers neither conduct, nor claim to conduct any research pertaining to the parental abilities of homosexuals.

Brewaeys and Van Hall (1997)
This is a balanced and reasoned review of the literature on lesbian motherhood. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals.

Cramer (1986)
This is a review of the literature on gay parents. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals.

Falk (1989)
The researcher neither conducted, nor claimed to have conducted any research in support of the assertion about lesbian mother.

Gottman (1990)
This is a review of the literature on gay and lesbian parents. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals.

Green and Bozett (1991)
This article was reviewed and critiqued earlier.

Kirkpatrick (1987)
This is a review of several clinical cases seen for therapy by the author. There is no sampling, instrumentation, or research protocol

Kirkpatrick (1996)

This is a review of the literature on lesbian parents. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals

MacCandlish (1987)

The author invited five lesbian mother families to participate in a two-hour structured interview in the subject's home. There are no details provided about how these families were recruited, their backgrounds, their motivations to participate, or the instrumentation used. There was no comparison group, and there was no analysis (quantitative) of results. No scientific inferences may be drawn from this project.

O'Connell (1993)

This was described as an "exploratory design" involving "open-ended" interviews with a questionnaire guide. It relied on a non-probability self-selected sample of 6 lesbian (age 16-23) and 5 gay (aged 19 to 23) parents obtained through snowball methods, and by placing an advertisement in two Boston gay newspapers and a local woman's newspaper. The subjects had all experienced their parents' divorce. Interviews were conducted by the researcher only. No mention of reliability is made. Instrumentation is not described sufficiently to judge its quality. There was no comparison group. No scientific inferences may be drawn from this project.

Patterson and Chan (1997)

This is a review of the literature on gay fathers. The researchers do not report any new research in this article.

Pennington (1987) # 31

The researcher describes a clinical sample of 32 children from 28 lesbian mother families that she treated since 1977. All but 2 children were seen at an outpatient psychotherapy clinic for gay men, lesbians, and their families in San Francisco. The author provides her

impressions of the issues that these children faced as they dealt with their parents' troubles. There is no sampling, instrumentation, or statistical analysis. There was no comparison made with children from heterosexual parents.

Pies (1990)

This is not a research article. It is a journalistic account of personal experiences.

Allen and Burrell (1996).

The analysis of this study is described in detail in the body of the affidavit.

Chan, Raboy and Patterson (1998).

The researchers assembled a self-selected sample by recurring families from former clients of The Sperm Bank of California. Clients who conceived and gave birth to children at least 5 years before the study was conducted were invited to participate. 195 families were so identified. The researchers were able to locate and contact 108 (55%). Of these 108, a total of 80 (74%) agreed to participate. The overall response rate, therefore, was 80/195 = 41%. Response rates, however, differed dramatically by sexual orientation of the parent. All eligible lesbian couples (100%) participated. But only 30% of lesbian single mothers, 31% of heterosexual couples and 30% of heterosexual single mothers participated.

As almost every study reviewed so far has found, these researchers note that the sample of lesbian biological mothers had significantly more education than did others. The lesbians also had higher average incomes. We cannot know about the majority of heterosexuals who decided not to participate.

The researchers administered several well-known and reliable measures of children's well being.

The authors acknowledge the limited power of their statistical analyses, and failed to incorporate statistical controls for the differences (in education and income) found among their groups.

Several potential sources of bias are acknowledged. First, the initial contact with potential subjects was from The Sperm Bank rather than the researchers. The extent to which this elicited differential participation rates is unknown. But surely, the dramatically different response rates are a critical source of concern for the results of this study. The failure to control for (acknowledged) differences among groups is also a flaw in the analysis. And probably most important, the use of women who have been artificially inseminated raises very serious questions about how representative this group of lesbians is. Due to the problems with the sample and methods of analysis, no scientific inferences may be drawn from this research.

Brewaeys, Ponjaert, Van Hall, and Golombok (1997)

This is a well-designed analysis that attempted to study entire populations rather than samples of them. The "sample" of 30 lesbian mother families with children (aged 4-8) conceived through Donor Insemination was recruited through the Fertility Department of the Brussels University Hospital. All families where the mother had attended the clinic between 1986 and 1991 were asked to participate. The agreement rate was 100%. The comparison group of 38 heterosexual Donor Insemination families and of 30 naturally conceived heterosexual families was recruited through the Fertility Department and the Obstetric Department of the University Hospital Leiden. All heterosexual families with a child born between 1986 and 1990 were asked to participate. Similar requests were made to parents whose children were born naturally. Response rates were 53% for the heterosexual Donor Insemination families, and 60% for the naturally conceived families. In-home interviews were conducted. It is fair to say that the sample may be considered broadly representative for the general population of lesbian mothers who attended a fertility clinic in order to conceive. Response rates and self-selection biases for the other groups jeopardize the degree to which each represents the relevant population, although the procedure is vastly superior to almost all others reviewed in this brief.

Comparisons of the groups revealed that they differed on educational levels with lesbians having considerably higher average educational attainments. Education, however, was not controlled in subsequent analyses. Much of the instrumentation consisted of reliable measures of child well being. The statistical analyses (though lacking needed controls) revealed no significant differences in the quality of relationships between lesbians (and their partners) and heterosexual couples. Nor was the parent-child relationship different among groups when biological mothers were compared. Unfortunately, the samples were too small to draw any conclusions about the lack of difference between groups (i.e. the study lacked sufficient statistical power). And finally, this study suffers from the same problem noted above, women who have been inseminated by artificial methods are likely to differ in important, yet unknown ways from lesbians who have conceived naturally. Still, despite the obvious limitations, this is one of the better studies among all that were reviewed.

Flacks, Ficher, Masterpasqua, and Josepth (1995)
This study was reviewed and critiqued above.

Steckel (1985)
This citation refers to an unpublished doctoral dissertation.

Golombok, Spencer, and Rutter (1983).
This study was reviewed and critiqued above.

Tasker and Golombok (1997)
This study was reviewed and critiqued above.

Gottman (1990)
This review of the literature was discussed earlier.

Schwartz (1985) Unpublished dissertation)

This citation refers to an unpublished doctoral dissertation.

Karkpatrick, Smith, and Roy (1981)

The researchers report on a study of the psychological status of a non-probability self-selected sample of 10 boys and 10 girls living full time with their "self identified" lesbian mothers. A comparison group of 10 boys and 10 girls living full-time with their single-heterosexual mothers was also evaluated. Mothers were recruited through snowball sampling and with a request in a National Organization for Women newsletter. All participants in the study, therefore, were self-selected. Each child was evaluated by several different researchers. No descriptive information is provided that would allow me to assess the differences between the two groups in terms of education, income, or other possibly extraneous influences. No information is provided about the children's backgrounds that might allow the reader to assess the findings in light of such factors. In the absence of statistical analysis, the authors conclude "lesbian mothers and heterosexual mothers were very much alike in their marital and maternal interests, current life-styles, and childrearing practices." (p 550). This is a good qualitative study, though it does not offer scientific evidence about the comparative profiles of the two groups.

Puryear (1983)

This citation refers to an unpublished doctoral dissertation.

Rees (1979) unpublished doctoral dissertation

This citation refers to an unpublished doctoral dissertation.

Barrett and Robinson (1990)

This is not a research report but a series of case studies of an unknown group of children of gay fathers. The authors raise an important point. They note: "In reviewing the impact

of gay fathering on children, it is important to acknowledge that most children who live with gay fathers are also the products of divorce and may present psychological distress that typically accompanies families experiencing marital dissolution. All too often the emotional distress of children with gay parents is solely attributed to the parents' sexual orientation rather than seen as a complex mixture of family dynamics, divorce adjustment, and incorporation of the parents' sexual coming out." (p 82). In making this point, the author reminds us that research on this subject must control for such obvious factors. Failure to do so will bias the results of any study. None of the studies reviewed controlled for such factors.

Golombok, Spencer, and Rutter (1983) # 10

The researchers report the results of studies conducted on non-probability samples of 27 lesbian families with a total of 37 children, and a comparison group of 27 heterosexual families with a total of 37 children. The definition of "lesbian" used was that a women must regard herself as predominantly or wholly lesbian and must currently be in a homosexual relationship, or have been in one in her last relationship. "Heterosexual" was defined behaviorally, by recruiting women whose last sexual relationship was with a man. Personal interviews were conducted. Instrumentation is not described in detail, reliability of indicators is not reported, nor is inter-rater reliability noted.

The two groups differed in an important way. All of the single-parents lived alone with their children. Most of the lesbians lived with a partner (only 9 of 27 lived alone with their children). Though the two groups were similar in regards age, and past marital status, they differed importantly on educational levels (67% of the lesbians and 37% of the heterosexual women had advanced education/training (p 556). The two groups of mothers also differed in their contact with their children's father.

Despite the differences between the two groups, appropriate statistical controls were not employed to adjust for these differences. The authors acknowledge the limitations of these results when they note "It is not possible to know what biases were involved in the method of sample selection." (569). Moreover, since almost all the children had been

born into a heterosexual household where they had spent at least two years, "This may be relevant in that both gender identity and sex role behavior are established early in the preschool years and the roots of sexual object choice (in so far as they are experiential) may also be found in the same age period. Accordingly, it would be unjustified to generalize our findings to rearing in a lesbian household from the outset." (p 569)

Huggins (1989) # 15

This article reports the results of a study of self-esteem among adolescents. The author assembled two non-probability samples. 36 adolescent children (13 to 19) from 32 families were divided into two groups based on their mother's sexual "object choice." The resulting samples contained nine male and female adolescents each. There is no description of how the sample was selected or obtained. The author notes that "to be asked to participate in the study, the children had to be aged 13 to 19 years and be living with their self-designated lesbian mother or self-designated heterosexual mother. The children were the biological products of a heterosexual marriage that had ended in divorce at least one year prior to the time of the study." (p 126). The author relies on a well-known measure that has established reliability in large samples. Presumably, all in-person interviews were conducted by the author (though this is not mentioned). There are no statistical controls used to compensate for potential extraneous factors. And without any information about how the sample was obtained, it is not possible to comment on the likely biases inherent in this project.

Green, Mandel, Hotvedt, Gray, and Smith (1986)

This research was reviewed and critiqued above.

Hotvedt and Mandel (1982) # 45

The authors report a study of "self designated" lesbians with custody or joint custody of at least one child (age 3-11) and a matched heterosexual sample of "self designated" heterosexual single mothers. Sample sizes are not reported. Sample recruitment strategies are not reported. The author made a good attempt to deal with extraneous

factors by matching the (unknown size) samples on age, race, and marital status of the mother, sex of the child, length of separation from the father, income of the family, education of the mother, and mother's religion as a child. Self administered questionnaires appear to have been employed. There is no description of the instrumentation except for well-known measures of mental ability. No results are presented. No response rate can be calculated. Without any description of the sample, or any statistical results, it is impossible to evaluate this study.

Lesbian and Gay Parenting at (American Psychological Association)(1995).

This is a joint publication of the American Psychological Association's Committee on Women in Psychology, Committee on Lesbian and Gay Concerns, and Committee on Children, Youth, and Families. It is written by Professor Charlotte Patterson, and is a review of the literature and annotated bibliography. It is not a research article.

Rees (1979)

This citation refers to an unpublished doctoral dissertation.

Flaks, Fischer, Masterpasqua, and Joseph (1995)

This study was reviewed and critiqued above.

Green, Mandel, Hotvedt, Gray, and Smith (1986)

This research was reviewed and critiqued above.

Kirkpatrick, Smith and Roy (1981)

This article was reviewed and critiqued above.

Golombok, Spencer and Rutter (1983)

This article was reviewed and critiqued above.

Kirkpatrick (1987)

This summary of several clinical cases was reviewed and critiqued earlier.

Patterson and Redding (1996)

This review of the literature was discussed earlier.

Bailey, Bobrow, Wolfe and Mikach (1995)

The researchers recruited a non-probability sample of 55 gay and bisexual fathers through advertisements in homophile publications. These self-selected men were asked to discuss their sons. The sons were subsequently contacted by the researchers. Of the total of 82 sons available, information was gathered from 43 (52%). Instrumentation is not described, and there are no reports on reliability. There was no comparison group. The number of interviewers is not reported, nor are inter-rater reliabilities reported. 9% of the (contacted) sons were found to be homosexuals, though no operational definition of that term is provided. Rather, both fathers and sons were asked to characterize (the sons) as homosexual, heterosexual, or bisexual, allowing the subjects to define the terms as they wished.

The authors acknowledge the most serious potential bias of the study, self-selection. "The most important potential bias is that fathers decisions to participate might depend in part on their sons' sexual orientations. .. The second limitation concerns the absence of a control group." (p 127). Most interestingly, the researchers acknowledge that the rate of homosexuality among the sons of gay men is higher than found in the general population. "It could be argued the rate of homosexuality in the sons (9%) is several time higher than that suggested by the population-based surveys and is consistent with a degree of father-to-son transmission." (p 128). The authors argue that this is not the case, however, due to the design problems of the study and the sample. The authors appear unwilling to accept

the findings of their own study and go to lengths to explain why the results should not be interpreted on their face. .

Golombok, Spencer and Rutter (1983)

This study was reviewed and critiqued above.

Golombok and Tasker (1996)

This study is reviewed in the body of my affidavit.

Gottman (1990)

This article was reviewed and discussed earlier.

Green, Mandel, Hotvedt, Gray, and Smith (1986)

This research was reviewed and critiqued above.

Green (1978)

The author reports on his study of the sexual identity of 37 children raised by homosexual or transsexual parents. The author (a psychiatrist) examined 37 children who were being raised by at least one parent who was either transsexual or homosexual. This is a clinical sample and cannot be regarded as representative of any defined population. The instrumentation (psychiatric treatments) are not detailed. There is no mention of reliability given that the author conducted all sessions. There is no comparison group.

Hoeffer (1981)

The author reports the result of a comparison of 20 lesbian and 20 heterosexual single mothers from the San Francisco Bay area and their only or oldest child, ages six through nine. The definitions of homosexual and heterosexual are "self identified." The author gives no indication of how the subjects were recruited. No comparative statistics are

provided to permit a comparison of the two groups. A modified version of a reliable measure of children's toy preferences was employed. All interviews were conducted by the author in the home of the subject. Without information about how the two groups compared (on, for example, education, age, income, race, etc.) or how the subjects were recruited for the study, it is impossible to comment on the potential biases in this study.

Kirkpatrick, Smith, and Roy (1981)

This study was reviewed and critiqued above.

Miller (1979)

The author conducted depth interviews with a snowball sample of 40 homosexual fathers and 14 of their children. No further description of the sampling is provided. No details are offered about the instrumentation. No comparison group was involved. There is no discussion of how "homosexuality" was measured. The author reports that 3 of the 14 men said they had fantasized about having sex with their sons (but none had ever acted on it)(p546). One in six sons, and one in eight daughters were homosexuals. This finding led the author to conclude "On the basis of this small, nonrandom sample, there does not appear to be a disproportionate amount of homosexuality among the children of gay fathers."(p 547) despite the absence of any comparative evidence from heterosexuals.

Schwartz (1986)

This is an unpublished doctoral dissertation. .

142. The comments and analysis contained in the main body of this affidavit and the six Appendices that follow the main body comprise the totality of my opinion in this matter

Sworn before me at the City
of in the State
of Virginia, in the United
States of America, this
day of March, 2001

Steven L. Nock

Notary Public

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Case Nos. 10-2204, 10-2207 and 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

BRIEF OF *AMICUS CURIAE*, REPRESENTATIVE LAMAR SMITH IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE

When a federal law is challenged, no one has a greater interest in the defense of that law than Congress, the representatives of the American people. Ordinarily, Congress relies on the Department of Justice ("DOJ") to provide a robust defense of federal laws. In the past two years, however, DOJ has openly acknowledged a new-found reluctance to present a vigorous defense of the Defense of Marriage Act ("DOMA"). As Assistant Attorney General Tony West recently explained, DOJ has "presented the court through [its] briefs with information which seemed to undermine some of the previous rationales that have been used [in] defense of that statute." Ryan J. Reilly, *DOJ Official: Defending DADT, DOMA "Difficult" for Administration*, Talking Points Memo, Nov. 22, 2010.[1] In fact, DOJ "has worked with the Civil Rights Division's liaison to the gay, lesbian, bisexual and transgender community" to ensure it does not "advance arguments that they would find offensive." *Id.*

Indeed, DOJ has chosen not to present the Court with the arguments embraced by the Supreme Court and every other state and federal appellate court to consider challenges to the traditional opposite-sex definition of marriage under the federal constitution. Rather, it has adopted an approach that even political

[1] *available at* http://tpmmuckraker.talkingpointsmemo.com/2010/11/doj_official_defending_dadt_doma_difficult_for_administration.php.

supporters of same-sex marriage describe as "faint-hearted advocacy" of a duly enacted federal statute.[2] The anemic defense provided by DOJ does not begin to adequately inform this Court of the binding precedent and clear rational basis supporting the federal definition of marriage. In order to fully inform this Court, Representative Lamar Smith, Chairman of the House Committee on the Judiciary, respectfully submits this brief.

All parties have consented to this filing. No party's counsel authored the brief in whole or in part, and no party, party's counsel, or other person contributed money intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

This Brief presents critical arguments supporting DOMA that are conspicuously absent from DOJ's current defense of the law. In prior challenges to DOMA—in which the law has been consistently upheld—DOJ argued successfully that the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), is "binding and dispositive" of DOMA's constitutionality. *E.g.*, Defs.' Br. Mot. Dismiss at 5, 6, *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (No.

[2] "[*Gill v. United States*] looks almost like collusive litigation .... As a supporter of gay marriage, I still think that the DOJ's faint-hearted advocacy is no way to run a legal system." Richard A. Epstein, *Judicial Offensive Against Defense of Marriage Act*, Forbes.com, July 12, 2010, http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html.

8:04-cv-01680) (ECF No. 39). This brief provides the Court with that missing argument.

In addition, in each of its past successful cases, DOJ forcefully argued that the traditional opposite-sex definition of marriage codified by DOMA furthers the important interests identified by Congress—including, most notably, society's "deep and abiding interest in encouraging responsible procreation and child rearing," Comm. on the Judiciary, Report on DOMA, H.R. Rep. No. 104-664 at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917. *See, e.g.*, Br. Appellee United States at 33, 37, *Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006) (No. 05-56040) (arguing that DOMA furthers these "manifestly legitimate" interests).[3] Although under the current Administration, DOJ has suddenly disavowed these interests, whether DOMA furthers "manifestly legitimate" interests does not turn on Executive-branch policy shifts. The interests invoked by Congress have not changed. And many courts—including every federal or state appellate court to consider the issue under the Federal Constitution, and the majority of state appellate courts to do so under their own constitutions—have found the same interests identified by Congress more than sufficient to sustain the traditional opposite-sex definition of marriage. This brief provides the Court with a defense

[3] The DOJ's brief in *Smelt* is included in full in the Addendum.

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of the principal rationale articulated by Congress in enacting DOMA and repeatedly embraced by appellate courts across the Nation.

ARGUMENT

I. THE DISTRICT COURT'S RULINGS CONTRADICT BINDING PRECEDENT FROM THE SUPREME COURT AND THE UNIFORM JUDGMENT OF STATE AND FEDERAL APPELLATE COURTS ACROSS THE NATION.

To read the district court's opinions, one might think that the validity of the traditional opposite-sex definition of marriage under the Federal Constitution was an issue of first impression. Nothing could be further from the truth. Indeed, the district court's holding that the United States Constitution requires the federal government to recognize same-sex relationships as marriages contravenes binding precedent from the Supreme Court. It is also contrary to the consistent decisions of every state and federal appellate court to address the validity of the traditional definition of marriage under the Federal Constitution.

A. THE SUPREME COURT'S DECISION IN BAKER V. NELSON MANDATES REVERSAL OF THE DISTRICT COURT'S RULINGS.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court unanimously dismissed, "for want of substantial federal question," an appeal from the Minnesota Supreme Court presenting the same questions at issue here: whether the government's refusal to recognize same-sex relationships as marriages violates due process and equal protection. *Id.*; *see also* Jurisdictional Statement at 3, *Baker v.*

Nelson, 409 U.S. 810 (1972) (No. 71-1027); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971). Although *Baker* was not cited by the district court, Plaintiffs, or even DOJ, the Supreme Court's dismissal of the appeal in that case was a decision on the merits that is binding on lower courts on the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *accord Auburn Police Union v. Carpenter*, 8 F.3d 886, 894 (1st Cir. 1993). It thus constitutes "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976). And because Plaintiffs' claims are the same as those rejected in *Baker*, they are foreclosed by that decision.

B. The District Court's Ruling Is Contrary to the Unanimous Conclusion of Appellate Courts Across the Country.

The district court's decision conflicts not only with *Baker*, but also with the decisions of *every* other state or federal appellate court to address the validity of the traditional opposite-sex definition of marriage under the Federal Constitution, including the United States Courts of Appeals for the Eighth and Ninth Circuits, three state courts of final resort, and four intermediate state courts. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 675-77 (Tex.

Ct. App. Dec. 8, 2010); *Standhardt v. Superior Court of Ariz.*, 206 Ariz. 276, 278, 77 P.3d 451, 453 (Ariz. Ct. App. 2003); *Singer v. Hara*, 11 Wash. App. 247, 262-64, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 291 Minn. at 313-15, 191 N.W.2d at 187. The district court's decisions thus stand in stark conflict with the considered, uniform judgment of this Nation's appellate courts.

II. DOMA EASILY SATISFIES RATIONAL BASIS SCRUTINY.

When it codified the traditional opposite-sex definition of marriage for purposes of federal law, Congress clearly articulated the overriding societal interest it sought to advance: "At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children." H.R. Rep. No. 104-664 at 13, 1996 U.S.C.C.A.N. at 2917. In identifying this interest, Congress stood on firm, well-trodden ground: as eminent authorities throughout the ages have uniformly recognized, it is precisely because marriage serves this vital, universal interest that it has existed in virtually every society throughout history. And, as demonstrated below, Congress's decision to provide

federal recognition and benefits to committed opposite-sex relationships plainly furthers the vital interests that marriage has always served.[4]

A. RESPONSIBLE PROCREATION AND CHILDREARING HAVE ALWAYS BEEN AN ANIMATING PURPOSE OF MARRIAGE IN VIRTUALLY EVERY SOCIETY.

The federal definition of marriage as "a legal union between one man and one woman as husband and wife," 1 U.S.C. § 7 (2010), is neither surprising nor invidious. To the contrary, with only a handful of very recent exceptions, marriage is, and always has been, limited to opposite-sex unions in virtually every society. Indeed, until recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 855 N.E.2d 1, 8 (N.Y. 2006). In the words of highly respected anthropologist Claude Levi-Strauss, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." *The View From Afar* 40-41 (1985); *see also* G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Marriage, as the socially

[4] DOMA is also rationally related to Congress's legitimate interests in administrative efficiency and morality. *See* H.R. Rep. No. 104-664 at 15-16, 18; Br. Professor Robert P. George et al., Amici Curiae Supporting Appellants.

recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.").

Nor is this traditional limitation in any way arbitrary or irrational. Rather, it reflects the undeniable biological reality that opposite-sex unions—and only such unions—can produce children. Marriage, thus, is "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction* to 1 A History of the Family: Distant Worlds, Ancient Worlds 1, 5 (Andre Burguiere, et al. eds., Belknap Press of Harvard Univ. Press 1996) (1996). Indeed, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.

This central—indeed animating—purpose of marriage was well explained by William Blackstone, who, speaking of the "great relations in private life," describes the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." William Blackstone, 1 Commentaries *422. Blackstone

then immediately turns to the relationship of "parent and child," which he describes as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*; *see also id.* *435 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown"). John Locke likewise writes that marriage "is made by a voluntary compact between man and woman," Second Treatise of Civil Government § 78 (1690), and then provides essentially the same explanation of its purposes:

> For the end of conjunction between male and female, being not barely procreation, but the continuation of the species; this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, who are to be sustained by those that got them, till they are able to shift and provide for themselves.

Second Treatise of Civil Government § 79 (1690).

Throughout history, other leading linguists, lawyers, and social scientists have likewise consistently recognized the essential connection between marriage and responsible procreation and childrearing. *See, e.g.*, Noah Webster, 2 An American Dictionary of the English Language (1st ed. 1828) (defining marriage as the "act of uniting a man and woman for life" and explaining that marriage "was instituted … for the purpose of preventing the promiscuous intercourse of the

sexes, for promoting domestic felicity, and for securing the maintenance and education of children"); Joel Prentiss Bishop, Commentaries on the Law of Marriage & Divorce § 225-26 (1st ed. 1852) ("It has always . . . been deemed requisite to the entire validity of marriage . . .that the parties should be of different sex…[T]he first cause and reason of matrimony . . . ought to be the design of having an offspring . . . the law recognizes [this] as the principle end[] of matrimony"); Bronislaw Malinowski, *Sex, Culture, and Myth* 11 (1962) ("the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents"); Quale, *supra*, at 2 ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); James Q. Wilson, *The Marriage Problem* 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); W. Bradford Wilcox, et al., eds., Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences 15 (2d ed. 2005) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society."). In the words of the sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. … The genius of the family system is that, through it, the society normally holds the biological parents responsible for each

> other and for their offspring. By identifying children with their parents … the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

The Meaning & Significance of Marriage in Contemporary Society 7-8, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution (Kingsley Davis, ed. 1985).

As these and many similar authorities illustrate, the understanding of marriage as a union of man and woman, uniquely involving the rearing of children born of their union, is age-old, universal, and enduring. Indeed, prior to the recent movement to redefine marriage to include same-sex relationships, it was commonly understood, without a hint of controversy, that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing. That is why, no doubt, the Supreme Court has repeatedly recognized marriage as "fundamental to our very existence and survival." *E.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967). And certainly no other purpose can plausibly explain the ubiquity of the institution. As Bertrand Russell put it, "it is through children alone that sexual relations become of importance to society." Bertrand Russell, *Marriage & Morals* 96 (Routledge Classics, 2009). Thus, "[b]ut for children, there would be no need of any institution concerned with sex." *Id.* at 48. Indeed, if "human beings reproduced asexually and … human offspring were self-sufficient[,] … would *any* culture have developed an institution

anything like what we know as marriage? It seems clear that the answer is no." Robert P. George, *et al.*, *What is Marriage?* 34 Harv. J. L. & Pub. Pol'y 245, 286-87 (Winter 2010).

In short, as Congress aptly explained:

> Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.

H.R. Rep. No. 104-664 at 14, *reprinted in* 1996 U.S.C.C.A.N. at 2918.

B. DOMA Plainly Furthers Society's Vital Interest in Responsible Procreation and Childrearing.

The traditional opposite-sex definition of marriage codified by DOMA plainly bears at least a rational relationship to society's interest in increasing the likelihood that children will be born to and raised by the couples who brought them into the world in stable and enduring family units. Because only sexual relationships between men and women can produce children, such relationships have the potential to further—or harm—this interest in a way, and to an extent, that other types of relationships do not. By retaining the traditional definition of marriage as a matter of federal law, Congress preserves an abiding link between that institution and this traditional purpose, a purpose that still serves vital interests that are uniquely implicated by male-female relationships. And by providing

federal recognition and benefits to committed opposite-sex relationships, DOMA provides an incentive for individuals to channel potentially procreative conduct into relationships where that conduct is likely to further, rather than harm, society's interest in responsible procreation and childrearing.

1. "[I]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised." *Adams*, 486 F. Supp. at 1124. Indeed, "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). The Supreme Court has confirmed this vital societal interest, holding repeatedly that marriage is "fundamental to our very existence and survival." *E.g.*, *Loving*, 388 U.S. at 12.

Underscoring society's interest in marriage is the undisputed truth that when procreation and childrearing take place outside stable family units, children suffer. As a leading survey of social science research explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. … There is thus value for children in promoting strong, stable marriages between biological parents.

Kristen Anderson Moore, et al., *Marriage from a Child's Perspective*, Child Trends Research Brief at 6 (June 2002).

In addition, when parents, and particularly fathers, do not take responsibility for their children, society is forced to step in to assist, through social welfare programs and by other means. Indeed, according to a Brookings Institute study, $229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture. Isabel V. Sawhill, *Families at Risk*, *in* Setting National Priorities: the 2000 Election and Beyond 108 (Henry J. Aaron & Robert Danton Reischauer eds., 1999).

More than simply draining public resources, the adverse outcomes for children so often associated with single parenthood and father absence, in particular, harm society in other ways, as well. As President Obama has emphasized:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.

President Obama, Statement at the Apostolic Church of God (June 15, 2008).[5]

[5] available at http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

Conversely, children benefit when they are raised by the couple who brought them into this world in a stable family unit. "[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore et al., *supra,* at 6. These benefits appear to flow in substantial part from the biological connection shared by a child with both mother and father. *See, e.g., id.* at 1-2 ("[I]t is not simply the presence of two parents, … but the presence of *two biological parents* that seems to support children's development."); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, & Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents.").

In addition, there is little doubt that children benefit from having a parent of each gender. As Professor Norval Glenn explains, "there are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself." Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Soc'y 27 (2004). Many others agree. *See, e.g.*, David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood &*

Marriage are Indispensable for the Good of Children & Society 146 (1996) ("The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."); James Q. Wilson, *supra*, at 169 ("The weight of scientific evidence seems clearly to support the view that fathers matter."); David Blankenhorn, *Fatherless America* 25 (HarperPerennial 1996) ("In virtually all human societies, children's well-being depends decisively upon a relatively high level of paternal investment.").

2. As a simple and undeniable matter of biological fact, same-sex relationships, which cannot naturally produce offspring, do not implicate society's interest in responsible procreation in the same way that opposite-sex relationships do. *See Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("To fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it."). And given this biological reality, as well as marriage's central concern with responsible procreation and childrearing, the "commonsense distinction," *Heller v. Doe*, 509 U.S. 312, 326 (1993), that our law has traditionally drawn between same-sex couples, which are categorically incapable of natural procreation, and opposite-sex couples, which are in general capable of procreation, "is neither surprising nor troublesome from a constitutional perspective." *Nguyen*, 533 U.S. at 63. For as the Supreme Court has made clear,

"where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001) (internal quotation marks and citations omitted); *accord City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985). Simply put, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal quotation marks and citations omitted).

Even though some same-sex couples do raise children, they cannot create them in the same way opposite-sex couples do—as the often unintended result of even casual sexual behavior. As a result, same-sex relationships simply do not pose the same risk of irresponsible procreation that opposite-sex relationships do. And as courts have repeatedly explained, it is the unique procreative capacity of heterosexual relationships—and the very real threat it can pose to the interests of society and to the welfare of children conceived unintentionally—that the institution of marriage has always sought to address. *See, e.g.*, *Bruning*, 455 F.3d at 867; *Hernandez*, 855 N.E.2d at 7; *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. Ct. App. 2005).

3. Because sexual relationships between individuals of the same sex neither advance nor threaten society's interest in responsible procreation in the same

manner, or to the same degree, that sexual relationships between men and women do, the line drawn by DOMA between opposite-sex couples and other types of relationships, including same-sex couples, cannot be said to "rest[] on grounds wholly irrelevant to the achievement of the [government's] objective." *Heller*, 509 U.S. at 324 (citation omitted). Accordingly, it readily satisfies rational-basis scrutiny. *See id.* Indeed, it is well settled both that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson v. Robison*, 415 U.S. 361, 383 (1974), and, conversely, that the government may make special provision for a group if its activities "threaten legitimate interests … in a way that other [group's activities] would not," *Cleburne*, 473 U.S. at 448; *see generally Vance v. Bradley*, 440 U.S. 93, 109 (1979) (law may "dr[aw] a line around those groups ... thought most generally pertinent to its objective").

Not surprisingly, then, "a host of judicial decisions" have relied on the unique procreative capacity of opposite-sex relationships in concluding that "the many laws defining marriage as the union of one man and one woman … are rationally related to the government interest in 'steering procreation into marriage.' " *Bruning*, 455 F.3d at 867-68; *see also Wilson*, 354 F. Supp. 2d at 1308-09; *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004); *Adams*, 486 F. Supp. at 1124-25; *Baker*, 191 N.W.2d at 186-87; *In re Marriage of J.B.*,

326 S.W.3d 654, 680; *Standhardt* , 77 P.3d at 461-64 (Ariz. Ct. App. 2003); *Singer*, 522 P.2d at 1197. This is true not only of *every* appellate court to consider this issue under the Federal Constitution, but the majority of state courts interpreting their own constitutions as well. *See Conaway v. Deane*, 401 Md. 219, 317-23, 932 A.2d 571, 630-34 (Md. 2007); *Hernandez*, 855 N.E.2d at 7-8; *Andersen v. King County*, 138 P.3d 963, 982-85 (Wash. 2006) (plurality); *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64.[6] Without even citing any of these decisions, the district court summarily dismisses the proposition that procreation and childrearing bear any rational relationship to the traditional opposite-sex definition of marriage and thus effectively condemns as *irrational* scores of federal and state court judges who have disagreed.

C. THE DISTRICT COURT'S CONTRARY ARGUMENTS LACK MERIT.

In rejecting any rational relationship between the traditional opposite-sex definition of marriage embraced by DOMA and society's interest in responsible

[6] A number of foreign nations have reached the same conclusion. *See* French National Assembly, *Report Submitted on Behalf of the Mission of Inquiry on the Family and Rights of Children*, No. 2832 at 77 (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf, original at http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf) ("Above all else then, it is the interests of the child that lead a majority of the Mission to refuse to change the parameters of marriage."); Australian Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, at 37, http://www.aph.gov.au/senate/committee/legcon_ctte/marriage_equality/report/report.pdf .

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procreation, the district court failed meaningfully to engage the arguments embraced by so many other courts. Instead, it offered only a cursory and superficial analysis that is readily rebutted.

1. The district court first claimed that "[s]ince the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill v.Office of Personnel Management*, 699 F. Supp. 2d 374, 388 (D. Mass 2010). Not only does this claim rest on a hotly disputed premise, it is also simply beside the point. Indeed, it fails even to come to grips with the critical fact underlying society's interest in responsible procreation—the unique potential for relationships between men and women to produce children inevitably. *E.g.*, *Bruning*, 455 F.3d at 867.

"Despite legal contraception, numerous studies have shown that unintended pregnancy is the common, not rare, consequence of sexual relationships between men and women." Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution*, 2 U. St. Thomas L.J. 33, 47 (2004). And the question in nearly every case of unintended pregnancy is *not* whether the child will be raised by two opposite-sex parents or by two same-sex parents, but rather whether it will be raised, on the one hand, by both its mother and father, or, on the other hand, by its mother alone, often with public assistance. *See, e.g.*, William J. Doherty et al.,

Responsible Fathering, 60 J. Marriage & Fam. 277, 280 (1998) ("In nearly all cases, children born outside of marriage reside with their mothers."). And there simply can be no dispute that children raised in the former circumstances do better, on average, than children raised in the latter, or that society has a direct and compelling interest in avoiding the financial burdens and social costs too often associated with single parenthood. *See, e.g.*, Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries."). Thus, even if the district court were right that it matters not whether a child is raised by the child's own parents or by any two males or any two females, it would still be perfectly rational for society to make special provision through the institution of marriage for the unique procreative risks posed by sexual relationships between men and women.

At any rate, the district court's startling suggestion that children receive no special benefit, whatsoever, from being raised by their own mothers and fathers—

and indeed that it is *irrational* to believe otherwise[7]—simply cannot be squared with a wealth of contrary scholarship and empirical studies, as discussed above, nor with the most basic instincts embedded in the DNA of the human species. The law "historically … has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see also*, *e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."); *cf.* Convention on the Rights of the Child, G.A. Res. 44/25, Art. 7, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) ("as far as possible, [a child has the right] to know and be cared for by his or her parents"). And "[a]lthough social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." *Lofton*, 358 F.3d at 820. Courts have thus repeatedly upheld as rational the "commonsense" notion that "children will do best with a mother and father in the home." *Hernandez*, 855 N.E.2d at 7-8; *see also*, *e.g.*, *Bruning*, 455 F.3d at 867-68; *Lofton*, 358 F.3d at 825-

[7] "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111. Accordingly, so long as the "assumptions underlying [a law's] rationales" are at least "arguable," that is "sufficient, on rational basis review, to immunize the [legislative] choice from constitutional challenge." *Heller*, 509 U.S. at 333 (internal quotation marks and citation omitted).

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26; *cf. Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) ("the optimal situation for the child is to have both an involved mother and an involved father") (internal quotation marks and citation omitted).

Furthermore, the position statements cited by the district court and the studies on which they rely do not come close to establishing that the widely shared, deeply instinctive belief that children do best when raised by both their biological mother and their biological father is *irrational*. To the contrary, there are "significant flaws in the[se] studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents." *Lofton*, 358 F.3d at 825; *see also id.* (noting "the absence of longitudinal studies following child subjects into adulthood").[8]

In light of the limitations of these studies, it is not surprising that a diverse group of 70 prominent scholars from all relevant academic fields recently concluded:

> [N]o one can definitively say at this point how children are affected by being reared by same-sex couples. The current research on children reared by them is inconclusive and underdeveloped—we do not yet have any large, long-term, longitudinal studies that can tell us much about how children are affected by being raised in a same-sex

[8] *See generally* Br. Amicus Curiae American College of Pediatricians (collecting scholarly critiques of same-sex parenting studies).

> household. Yet the larger empirical literature on child well-being suggests that the two sexes bring different talents to the parenting enterprise, and that children benefit from growing up with both biological parents.

Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18 (2008).

The district court's confident assertions to the contrary notwithstanding, Congress, in the words of the Eleventh Circuit,

> could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.

Lofton, 358 F.3d at 825 n.26 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 999-1000 (Mass. 2003) (Cordy, J., dissenting)).

2. The district court also claimed that "an interest in encouraging responsible procreation plainly cannot provide a rational basis" for DOMA because "the ability to procreate is not now, nor has it ever been, a precondition to marriage." 699 F. Supp. 2d at 389. But the district court did not even acknowledge the many cases squarely and repeatedly rejecting precisely this argument. *See, e.g., Standhardt*, 77 P.3d at 462-63; *Baker*, 191 N.W.2d at 187; *Adams*, 486 F. Supp. at 1124-25; *In re Kandu*, 315 B.R. at 146-47; *Conaway*, 932 A.2d at 633 (applying state constitution); *Hernandez*, 855 N.E.2d at 11-12 (same);

Andersen, 138 P.3d at 983 (same); *Morrison*, 821 N.E.2d at 27 (same).

As these cases have repeatedly recognized, it is well settled that rational-basis review allows the government to draw bright lines, "rough accommodations," *Heller*, 509 U.S. at 321, and "commonsense distinction[s]," *id.* at 326, based on "generalization[s]," *id.*, presumptions, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315 (1976), and "common-sense proposition[s]," *Vance*, 440 U.S. at 112. "[C]ourts are compelled under rational-basis review to accept [such] generalizations," *Heller*, 509 U.S. at 321, presumptions, and propositions, moreover, unless they hold true in "so few" circumstances "as to render [a line based upon them] wholly unrelated to the objective" of the law drawing that line, *Murgia*, 427 U.S. at 315-16; *see also Williamson v. Lee Optical*,348 U.S. 483, 487 (1955) (upholding categorical rule that was based on an assumption that the legislature "might have concluded" was "often enough" true). And the presumption that sexual relationships between men and women can result in pregnancy and childbirth holds true for the vast majority of couples and is plainly sufficient to render rational, at least, the "commonsense distinction" the law has traditionally drawn between opposite-sex couples, and same-sex couples, which are categorically incapable of natural procreation.

Furthermore, any policy conditioning marriage on procreation would presumably require enforcement measures—from premarital fertility testing to

eventual annulment of childless marriages—that would surely violate constitutionally protected privacy rights. *See, e.g., Standhardt*, 77 P.3d at 462-63; *Adams*, 486 F. Supp. at 1124-25. And such Orwellian measures would, in any event, be unreliable. *See, e.g.*, Monte Neil Stewart, *Marriage Facts*, 31 Harv. J. L. & Pub. Pol'y 313, 345 (2008) (noting the "scientific (i.e., medical) difficulty or impossibility of securing evidence of [procreative] capacities"). Even where infertility is clear, moreover, usually only one spouse is infertile. In such cases marriage still furthers society's interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in sexual activity with a third party, for that interest is served not only by *increasing* the likelihood that procreation occurs *within* stable family units, but also by *decreasing* the likelihood that it occurs *outside* of such units.[9]

For all of these reasons, it is neither surprising nor significant that societies throughout history have chosen to forego an Orwellian and ultimately futile attempt to police fertility and have relied instead on the common-sense presumption that sexual relationships between men and women are, in general, capable of procreation. *See, e.g.*, *Nguyen*, 533 U.S. at 69 (2001) (Congress could properly enact "an easily administered scheme" to avoid "the subjectivity,

[9] Infertile opposite-sex marriages also advance the institution's central procreative purposes by reinforcing social norms that heterosexual intercourse—which in general, though not every case, can produce offspring—should take place only within marriage. *See, e.g., id.* at 344-45.

intrusiveness, and difficulties of proof" of "an inquiry into any particular bond or tie."); *Murgia*, 427 U.S. at 315-16 (government may rely on reasonable but imperfect irrebuttable presumption rather than conduct individualized testing). By so doing, societies further their vital interests in responsible procreation and childrearing by seeking to channel the presumptive procreative *potential* of opposite-sex relationships into enduring marital unions so that *if* any offspring are produced, they will be more likely to be raised in stable family units by the mothers and fathers who brought them into the world.[10]

3. The district court's remaining arguments warrant little response. Because, under rational-basis review, DOMA "must be upheld … if there is any reasonably conceivable state of facts that could provide a rational basis" for it, and Plaintiffs thus bear "the burden … to negative every conceivable basis which might support it," *Heller*, 509 U.S. at 320, the fact that DOJ "disavowed Congress's

[10] Even where heightened scrutiny applies, courts have not "required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Indeed, applying heightened scrutiny in a closely analogous context, the Supreme Court rejected as "ludicrous" an argument that a law criminalizing statutory rape for the purpose of preventing teenage pregnancies was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant." *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 475 (1981) (plurality); *see also id.* at 480 n.10 (Stewart, J., concurring) (rejecting argument that the statute was "overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible," because, *inter alia*, "a statute recognizing [such defenses] would encounter difficult if not impossible problems of proof").

stated justifications for the statute," 699 F. Supp. 2d at 388, is of little moment. Simply put, this Court's review of DOMA's rationality is not limited to "explanations … that may be offered by litigants or other courts." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988).

Further, the district court's assertions that "denying federal recognition to same-sex marriages … does nothing to promote stability in heterosexual parenting," and that "denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure," 699 F. Supp. 2d at 389, reflect a fundamental misunderstanding of settled principles of rational-basis review. There can be little doubt that *providing* federal recognition and benefits to committed opposite-sex couples makes *those potentially procreative relationships* more stable, and by doing so promotes society's interest in responsible procreation and childrearing. *See, e.g.*, Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Res. & Pol'y Rev. 135, 136 (2004) ("A well-known difference between cohabitation and marriage is that cohabiting unions are generally quite short-lived.").[11] And under *Johnson* and other controlling Supreme Court authorities, the relevant inquiry is not, as the

[11] Contrary to the district court's assertion, providing recognition and benefits to opposite-sex couples furthers this vital societal interest directly, not "by punishing same-sex couples who exercise their rights under state law." 699 F. Supp. 2d at 389.

district court would apparently have it, whether denying federal recognition and benefits to include same-sex couples is *necessary* to promote society's interest in responsible procreation and childrearing, but rather is whether providing such recognition and benefits to committed opposite-sex relationships furthers interests that would not be furthered, or would not be furthered to the same degree, by recognizing same-sex relationships as marriages. *See, e.g., Andersen*, 138 P.3d at 984; *Morrison*, 821 N.E.2d at 23. And as demonstrated above, the answer to this inquiry is clear.

The district court's failure to "discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex," 699 F. Supp. 2d at 389, is even further afield. Marriage has always been uniquely concerned with steering potentially procreative sexual conduct into stable marital relationships. Its rationality in no way depends on its also steering those not inclined to engage in such conduct into such relationships.

4. In short, the district court's superficial analysis does not begin to undermine the rational relationship between the traditional definition of marriage codified by DOMA and society's vital interest in responsible procreation and childrearing.

CONCLUSION

For the forgoing reasons, Amici respectfully request that this Court reverse the district court's judgments.

Respectfully submitted,
this 27th day of January 2011

s/ David Austin R. Nimocks
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Attorney for Amici

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

s/ David Austin R. Nimocks
David Austin R. Nimocks

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of Representative Smith in the consolidated cases of *Commonwealth of Massachusetts v. United States Department of Health and Human Services* and *Hara, Gill, et al. v. Office of Personnel Management*, Nos. 10-2204, 10-2207, and 10-2214,, with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ David Austin R. Nimocks
David Austin R. Nimocks

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AMERICAN COURTS ON MARRIAGE: IS MARRIAGE DISCRIMINATORY?

2000-2011

By Joshua Baker & William C. Duncan, Legal Analysts

EXECUTIVE SUMMARY

The majority of courts to consider the issue, as well as the majority of people voting on it, have rejected a right to same-sex marriage.

Over the past decade, the overwhelming majority of Americans who have been able to vote on the definition of marriage have soundly rejected the idea that same-sex marriage is a civil right. Thirty states have enacted amendments to their constitutions defining marriage as the union of a husband and wife. In Maine, voters rejected a state law that redefined marriage and in Iowa, voters defeated all of the three judges up for retention who had voted in favor of same-sex marriage.

It is less well known that the majority of American courts have also rejected the idea that there exists in state and national constitutions a right to same-sex marriage.

Since 2003, when the Massachusetts Supreme Judicial Court ruled invalid Massachusetts common law rules recognizing marriage only as the union of husband and wife, a total of four state high courts have ruled marriage laws unconstitutional.

Over the past ten years, at least ten other state and federal courts (excluding cases still pending on appeal) have ruled that marriage laws are not discriminatory, but rather are based on a legitimate relationship between the states' definition of marriage and procreation, including decisions from the high courts of Maryland, New York, and Washington, as well as the U.S. Court of Appeals for the 8th Circuit.

Even in New Jersey, where the courts mandated equal benefits for same-sex couples, the courts rejected the notion that the marriage laws constituted sex discrimination.

Additionally, during this time period four major international cases have upheld laws defining marriage as the union of a husband and wife.

U.S. CASES UPHOLDING MARRIAGE

State Supreme Courts

***Conaway v. Deane* 932 A.2d 571 (Md. 2007) at http://www.courts.state.md.us/opinions/coa/2007/44a06.pdf:**

"Virtually every Maryland case applying Article 46 has dealt with situations where the distinction drawn by a particular governmental inaction or action singled-out for disparate treatment men and women as discrete classes. . . . Based on our precedents interpreting Article 46, we conclude that the Legislature's and electorate's ultimate goal in putting in place the Maryland ERA was to put men and women on equal ground, and to subject to closer scrutiny any governmental action which singled out for disparate treatment men or women as discrete classes. . . . Turning to the language

of Family Law § 2-201, it becomes clear that, in light of the aforementioned purpose of the ERA, the marriage statute does not discriminate on the basis of sex in violation of Article 46. The limitations on marriage effected by Family Law § 2-201 do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class. Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct." (594-98).

"We agree that the State's asserted interest in fostering procreation is a legitimate governmental interest. As one of the fundamental rights recognized by the Supreme Court as a matter of personal autonomy, procreation is considered one of the most important of the fundamental rights. In light of the fundamental nature of procreation, and the importance placed on it by the Supreme Court, safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest."

"The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. As stated earlier in this opinion, marriage enjoys its fundamental status due, in large part, to its link to procreation. This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding). Acceptance of this notion is found in the clear majority of opinions of the courts that have considered the issue." (630-31) (citations omitted).

***Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) at http://www.courts.state.ny.us/ctapps/decisions/jul06/86-89opn06.pdf.**

"[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. . . . . The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. . . ."

"There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule-some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes-but the Legislature could find that the general rule will usually hold." (7).

"By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike-they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality

that the Supreme Court confronted in *Loving;* the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class." (10-11).

***Andersen v. King County* 138 P.3d 963 (Wash. 2006) at http://www.courts.wa.gov/newsinfo/content/pdf/759341opn.pdf:**

"[A]s *Skinner, Loving,* and *Zablocki* indicate, marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis." (982-83).

"We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both." (985).

Federal Appeals Courts

***Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) at http://www.ca8.uscourts.gov/opndir/06/07/052604P.pdf:**

"We hold that § 29 and other laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States." (*Citizens for Equal Prot. v. Bruning* (8th Cir. 2006) 455 F.3d 859, 871.) The court held that the Nebraska amendment defining marriage as the union of a man and a woman was related to the state's interest in "steering procreation into marriage," through "laws [that] encourage procreation to take place within the socially recognized unit that is best situated for raising children." (867.)

State Appeals Courts

***Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005) at http://www.domawatch.org/cases/indiana/morrisonvsadler/Opinion_CourtofAppeal.pdf:**

"The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse." (24.)

***Standhardt v. Superior Court* 77 P.3d 451 (Ariz. App. Div. 1, 2003) (review denied 2004 Ariz. LEXIS 62, May 25, 2004) at http://www.cofad1.state.az.us/opinionfiles/sa/SA030150.pdf:**

"We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."

Federal Trial Courts

***Wilson v. Ake* 354 F. Supp. 2d 1298 (M.D. Fla. 2005) at http://www.alliancealert.org/2005/20050119.pdf:**

"Plaintiffs also argue that this Court should apply strict scrutiny in determining the constitutionality of DOMA because it violates the Equal Protection Clause of the Fourteenth Amendment. The Eleventh Circuit has held that homosexuality is not a suspect class that would require subjecting DOMA to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Fifth Amendment's Due Process Clause. *See Lofton*, 358 F.3d at 818 (holding that homosexuality is not a suspect class and noting that "all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class."); *see also Kandu*, 315 B.R. at 144 (*Lawrence* "did not hold that same-sex couples constitute a suspect or semi-suspect class under an equal protection analysis") Moreover, DOMA does not discriminate on the basis of sex because it treats women and men equally. *Kandu*, 315 B.R. at 143 ("... DOMA does not classify according to gender, and the Debtor is not entitled to heightened scrutiny under this theory."). Therefore this Court must apply rational basis review to its equal protection analysis of the constitutionality of DOMA." (1307-08).

"[T]his court ... is bound by the Eleventh Circuit's holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest. . . . DOMA is rationally related to this interest." (1309).

***In re Kandu* 315 B.R. 123 (Bankr. W.D. Wash. 2004) at http://www.domawatch.org/cases/9thcircuit/InreKanduBkrDecision.pdf:**

"The legislative history clearly reveals that the primary purpose of DOMA is to restrict marriage to one man and one woman. The Debtor argues that because DOMA does not allow one woman to marry another woman, the legislation is a sex-based classification warranting strict scrutiny. DOMA, however, does not single out men or women as a discrete class for unequal treatment. Rather, as the court in *Baker*, observed, a marriage law such as DOMA "prohibit[s] men and women equally from marrying a person of the same sex." *Baker*, 744 A.2d at 880 n. 13. Women, as members of one class, are not being treated differently from men, as members of a different class. "The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law 'can be traced to a discriminatory purpose.' " *Baker v. Vermont*, 744 A.2d at 880 n. 13 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979)). There is no evidence, from the voluminous legislative history or otherwise, that DOMA's purpose is to discriminate against men or women as a class. Accordingly, the marriage definition contained in DOMA does not classify according to gender, and the Debtor is not entitled to heightened scrutiny under this theory. (144)

"Authority exits [*sic*] that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern." (146).

***Smelt v. Orange County*, 374 F. Supp.2d 861 (D. Cent. Calif. 2005) at http://oldsite.alliancedefensefund.org/userdocs/SmeltOpinion.pdf:**

"The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents."

"Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate

government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government. The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence."

"By excluding same-sex couples from the federal rights and responsibilities of marriage, and by providing those rights and responsibilities only to people in opposite-sex marriages, the government is communicating to citizens that opposite-sex relationships have special significance. Congress could plausibly have believed sending this message makes it more likely people will enter into opposite-sex unions, and encourages those relationships." (880).

CASES ORDERING CIVIL UNIONS BUT NOT SAME-SEX MARRIAGE

***Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) at http://lawlibrary.rutgers.edu/courts/supreme/a-68-05.doc.html:**

"We now must assess the public need for denying the full benefits and privileges that flow from marriage to committed same-sex partners. At this point, we do not consider whether committed same-sex couples should be allowed to marry, but only whether those couples are entitled to the same rights and benefits afforded to married heterosexual couples. Cast in that light, the issue is not about the transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people. We therefore must determine whether there is a public need to deny committed same-sex partners the benefits and privileges available to heterosexual couples."

"The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges catalogued in Section IV.B. Perhaps that is because the public policy of this State is to eliminate sexual orientation discrimination and support legally sanctioned domestic partnerships." (217)

"Raised here is the perplexing question-"what's in a name?"-and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? We are mindful that in the cultural clash over same-sex marriage, the word marriage itself-independent of the rights and benefits of marriage - has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples."

"If the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons for enacting such legislation. To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate." (221-22)

"To comply with the equal protection guarantee of Article I, Paragraph 1 of the

New Jersey Constitution, the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples. The State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage. If the State proceeds with a parallel scheme, it cannot make entry into a same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage. It may, however, regulate that scheme similarly to marriage and, for instance, restrict civil unions based on age and consanguinity and prohibit polygamous relationships." (224)

CASES ORDERING SAME-SEX MARRIAGE

State Supreme Courts

***Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) at http://graphics8.nytimes.com/packages/pdf/us/20090403iowa-text.pdf:**

"Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents. On the other hand, we acknowledge the existence of reasoned opinions that dual-gender parenting is the optimal environment for children. These opinions, while thoughtful and sincere, were largely unsupported by reliable scientific studies."

"We begin with the County's argument that the goal of the same-sex marriage ban is to ensure children will be raised only in the optimal milieu. In pursuit of this objective, the statutory exclusion of gay and lesbian people is both under-inclusive and over-inclusive. The civil marriage statute is under-inclusive because it does not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents. Such under-inclusion tends to demonstrate that the sexual-orientation-based classification is grounded in prejudice or 'overbroad generalizations about the different talents, capacities, or preferences' of gay and lesbian people, rather than having a substantial relationship to some important objective. *See Virginia*, 518 U.S. at 533, 116 S. Ct. at 2275, 135 L. Ed. 2d at 751 (rejecting use of overbroad generalizations to classify). If the marriage statute was truly focused on optimal parenting, many classifications of people would be excluded, not merely gay and lesbian people."

***Kerrigan v. Department of Public Health*, 957 A.2d 407 (Conn. 2008) at http://www.jud.ct.gov/external/supapp/Cases/AROcr/CR289/289CR152.pdf:**

"Before doing so, however, we note that the defendants expressly have disavowed any claim that the legislative decision to create a separate legal framework for committed same sex couples was motivated by the belief that the preservation of marriage as a heterosexual institution is in the best interests of children, or that prohibiting same sex couples from marrying promotes responsible heterosexual procreation, two reasons often relied on by states in defending statutory provisions barring same sex marriage against claims that those provisions do not pass even rational basis review. See, e.g., *Hernandez* v. *Robles*, supra, 7 N.Y.3d 359–60. In the present case, the

defendants' sole contention is that the legislature has a compelling interest in retaining the term 'marriage' to describe the legal union of a man and woman because 'that is the definition of marriage that has always existed in Connecticut . . . and continues to represent the common understanding of marriage in almost all states in the country.' The defendants acknowledge that many legislators hold 'strong personal beliefs . . . about the fundamental nature of marriage' as being between a man and a woman, and that no measure providing equal rights for same sex couples would have passed the legislature unless it expressly defined marriage in those terms."

***In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)** at http://www.courtinfo.ca.gov/opinions/documents/S147999.pdf:

"[A]lthough we do not agree with the claim advanced by the parties challenging the validity of the current statutory scheme that the applicable statutes properly should be viewed as an instance of discrimination on the basis of the suspect characteristic of sex or gender and should be subjected to strict scrutiny on that ground, we conclude that strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion —a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple." (pp. 9-10).

"Like Perez, subsequent California decisions discussing the nature of marriage and the right to marry have recognized repeatedly the linkage between marriage, establishing a home, and raising children in identifying civil marriage as the means available to an individual to establish, with a loved one of his or her choice, an officially recognized family relationship. . . . As these and many other California decisions make clear, the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual." (pp. 54-57). "The Proposition 22 Legal Defense Fund and the Campaign also rely upon several academic commentators who maintain that the constitutional right to marry should be viewed as inapplicable to same-sex couples because a contrary interpretation assertedly would sever the link that marriage provides between procreation and child rearing and would 'send a message' to the public that it is immaterial to the state whether children are raised by their biological mother and father. (See, e.g.,Blankenhorn, The Future of Marriage, supra, at pp. 201-212; Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation (2001) 24 Harv. J.L. & Pub. Pol'y 771, 797-799; Gallaher, What Is Marriage For? The Public Purposes of Marriage Law (2002) 62 La. L.Rev. 773, 779-780, 790-791.)"

"Although we appreciate the genuine concern for the well-being of children underlying that position, we conclude this claim lacks merit."

"Our recognition that the core substantive rights encompassed by the constitutional right to marry apply to same-sex as well as opposite-sex couples does not imply in any way that it is unimportant or immaterial to the state whether a child is raised by his or

her biological mother and father. By recognizing this circumstance we do not alter or diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child's biological parents to enter into and raise their child in a stable, long-term committed relationship. Instead, such an interpretation of the constitutional right to marry simply confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents). This interpretation also guarantees individuals who are in a same-sex relationship, and who are raising children, the opportunity to obtain from the state the official recognition and support accorded a family by agreeing to take on the substantial and long-term mutual obligations and responsibilities that are an essential and inseparable part of a family relationship." (pp. 77-78).

***Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) at http://caselaw.findlaw.com/ma-supreme-judicial-court/1447056.html:**

"We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution." (p. 954)

"It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. Punitive notions of illegitimacy and of homosexual identity further cemented the common and legal understanding of marriage as an unquestionably heterosexual institution. But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." (p. 961, n.23) (citations omitted).

"The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. 'The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.' Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." (p. 968) (citations omitted).

INTERNATIONAL CASES

***Schalk v. Austria*, Application no. 30141/04 (European Court of Human Rights 2010) at http://www.unhcr.org/refworld/pdfid/4c29fa712.pdf:**

"The Court is not persuaded by the applicants' argument. Although, as it noted in *Christine Goodwin*, the institution of

marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage." (¶58).

"In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society." (¶62).

***K.B. v. National Health Service Pensions Agency, et al.* (10 June 2003) Case No. C-117/01, 2003 ECJ CELEX LEXIS 650 (European Court of Justice) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:047:0003:0003:EN:PDF:**

"The second also lends support to the United Kingdom Government's position, since it refers to the fact that Article 12 of the European Convention on Human Rights protects only traditional marriage between two persons of opposite biological sex (see Eur. Court H.R., Rees v United Kingdom, judgment of 17 October 1986, and Cossey v United Kingdom, judgment of 27 September 1990). Those judgments encapsulate European law on the matter." (¶ 55).

***Joslin v. New Zealand*, (Communication No. 902/1999) (17 July 2002), U.N. Doc. CCPR/C/75/D/902/1999 (U.N. Human Rights Committee) at http://www1.umn.edu/humanrts/undocs/902-1999.html:**

"Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision.
Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other." (¶ 8.2)

***Corinne C.& Another*, Decision No. 2010-92 QPC, Constitutional Court of France, January 28, 2011 at** http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2010-92-qpc/decision-n-2010-92-qpc-du-28-janvier-2011.52612.html

"[T]he principle of equality does not prevent the legislator from ruling differently in situations that are different nor depart from equality on grounds of general interest as long as in one of the other case the resulting difference in treatment is in direct relation to the purpose of the law that establishes it."

The legislature "determined that the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rules of family law" and it is not the court's "prerogative to substitute its" opinion for that of the legislature.

NO. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re Marriage Cases

Judicial Council Coordination Proceeding No. 4365

On appeal from a decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652

San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506

Honorable Richard J. Kramer, Judge

APPLICATION FOR PERMISSION TO FILE BRIEF AMICI CURIAE; BRIEF AMICI CURIAE OF JAMES Q. WILSON, ET AL., LEGAL AND FAMILY SCHOLARS IN SUPPORT OF THE APPELLEES

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APPLICATION OF JAMES Q. WILSON, ET AL., LEGAL AND FAMILY SCHOLARS, FOR PERMISSION TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF THE APPELLEES

I. INTERESTS OF AMICI CURIAE

Amici Curiae are an interdisciplinary group of legal and family scholars with an interest in the role of marriage in law and society.

James Q. Wilson, formerly Shattuck Professor of Government at Harvard University (1961-1987), is Professor Emeritus at UCLA and a professor of Public Policy at Pepperdine University. He is the recent author of *The Marriage Problem: How our Culture has Weakened Families* (New

York: Harper Collins, 2002), and is one of the nation's leading experts on crime and family structure.

Douglas Allen, Ph.D., is the Burnaby Mountain Professor of Economics at Simon Fraser University. An expert in the field of law and economics, he has studied issues related to the family for 20 years and has published 15 articles on family economics in journals such as the *American Economic Review, Economic Inquiry*, and the *American Law and Economics Review*. He was the co-editor of *It Takes Two: The Family in Law and Finance* (C.D. Howe, 1999).

Hadley P. Arkes is Edward N. Ney Professor of Jurisprudence and American Institutions at Amherst College. He is the author of *Natural Rights and the Right to Choose, Beyond the Constitution, and First Things: An Inquiry Into the First Principles of Morals and Justice*. Among his many publications on constitutional jurisprudence and the family is a chapter entitled "The Family and the Laws" in *The Meaning of Marriage: Family, State, Market, and Morals* (Robert P. George and Jean Bethke Elshtain, eds. 2006).

David Blankenhorn is founder and President of the Institute for American Values and a co-founder of the National Fatherhood Initiative. Books he has written or co-edited on marriage and family

include: *Promises to Keep: Decline and Renewal of Marriage in America* (Lanham, MD: Rowman & Littlefield, 1996); *Fatherless America: Confronting Our Most Urgent Social Problem* (New York: Basic Books, 1995); and *The Future of Marriage* (New York: Encounter Books, 2007).

Lloyd R. Cohen, J.D., Ph. D. is Professor of Law at George Mason University School of Law. His publications on the subject of marriage, divorce, and the social and legal relationships of men and women include: "Marriage: The Long-Term Contract," (in *The Law and Economics of Marriage & Divorce*, Anthony W. Dnes & Robert Rowthorn ed., Cambridge University Press 2002), "Marriage As Contract," (in *The New Palgrave Dictionary Of Economics And the Law*, Peter Newman ed., Stockton 1998), *Rhetoric, The Unnatural Family, And Women's Work,* (81:8 Virginia L. Rev. 2275 [1995]), and *Marriage, Divorce, and Quasi Rents or, 'I Gave Him the Best Years of My Life,'* (16:2 J. of Legal Stud. 267 [1987], reprinted in *Law and Economics*, Richard A. Posner & Francesco Parisi ed., Elgar 1995).

David K. DeWolf, J.D., is Professor of Law at Gonzaga University School of Law, where he teaches in the areas of First Amendment law, criminal law and tort law.

Robert P. George, J.D., D.Phil., is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. His publications on marriage and the family include: *The Meaning of Marriage: Family, State, Market, and Morals* (with Jean Bethke Elsthain (eds.), Dallas, TX: Spence, 2006); *"What's Sex Got to Do With It? Marriage, Morality, and Rationality* (49 American Journal of Jurisprudence 63 [2004]); *Marriage and the Liberal Imagination* (with Gerard V. Bradley) (84 Georgetown Law Journal 301 [1995]).

Bernard E. Jacob is Alexander M. Bickel Distinguished Professor of Communications Law at Hofstra Law School where he teaches courses in Constitutional Law, First Amendment, and Jurisprudence. Before coming to Hofstra Law, Professor Jacob was a tenured faculty member at the UCLA School of Law, and a graduate of the University of California, Berkeley, School of Law (Boalt Hall).

William H. Jeynes is a professor of education at California State University – Long Beach, specializing in empirical research on the effect of family structure on child well-being, especially educational outcomes. He is the author of *Divorce, Family Structure, and the Academic Success of Children* (Binghamton, New York: Haworth Press), and has authored numerous journal articles on family structure and child outcomes including:

The Impact of Parental Remarriage on Children: A Meta-Analysis (2006) 40(4) Marriage and Family Review 75-102; *Examining the Effects of Parental Absence on the Academic Achievement of Adolescents: The Challenge of Controlling for Family Income*, (2002) 23(2) Journal of Family and Economic Issues 189-210; *The Effects of Recent Parental Divorce on their Children's Consumption of Marijuana and Cocaine* (2001) 35(3/4) Journal of Divorce and Remarriage 43-65; and *The Effects of Recent Parental Divorce on Their Children's Consumption of Alcohol*, (2001) 30(3) Journal of Youth and Adolescence 305-319.

Leon R. Kass, M.D., Ph.D. is Addie Clark Harding Professor in the Committee on Social Thought and the College at the University of Chicago and Hertog Fellow in Social Thought at the American Enterprise Institute. He was chairman of the President's Council on Bioethics from 2001 to 2005. His publications include *Wing to Wing, Oar to Oar: Readings on Courting and Marrying* (Notre Dame Press, 2000, with Amy A. Kass), and "The End of Courtship," (*Public Interest*, 1997).

Charles Kesler, is Professor of Government and Director of the Salvatori Center at Claremont McKenna College.

Daniel Hays Lowenstein is Professor of Law at the UCLA School of Law, where he teaches courses in Statutory Interpretation and Legislative Process, Political Theory, Election Law, and Law & Literature.

Katherine Shaw Spaht, Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center, is the author of three family law treatises and more than 40 law journal articles on family law. Professor Spaht has served since 1981 as the Rapporteur (Reporter) of the Persons (Marriage and Family) Committee of the Louisiana State Law Institute, and is recognized as the foremost expert in family law in the state of Louisiana. Her recent publications include *Matrimonial Regimes* (with Lee Hargrave), Vol. 16, Louisiana Civil Law Treatise (West 2nd ed., 1997) with annual pocket parts (1998-2004), *Family Law in Louisiana* (Law Center Publications Institute, 1994; 2nd ed. 1995; 3rd ed., 1998; 4th ed. 2000; 5th ed. 2003, 6th ed. 2004), "The Current Crisis in Marriage Law: Its Origins and Its Impact," in *The Meaning of Marriage: Family, State, Market and Morals* (Spence Pub. 2005), and "Postmodern Marriage As Seen Through the Lens of ALI's 'Compensatory Payments,'" in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge Univ. Press, 2006).

Thomas G. West, Ph.D., is Professor of Politics at the University of Dallas. His numerous publications include *Vindicating the Founders: Race,*

Sex, Class, and Justice in the Origins of America (Lanham, MD: Rowman and Littlefield, 1997) and "Progressivism and the Transformation of American Government," in John Marini & Ken Masugi (eds.), *The Progressive Revolution in Politics and Political Science: Transforming the American Regime* (Lanham, MD: Rowman and Littlefield, 2005).

II. REASONS FOR GRANTING APPLICATION

Our brief filed at the appellate level was inappropriately repudiated by the Attorney General, who seriously misunderstood our argument. (See State Appellants' Response to Amicus Curiae Briefs at pp. 8-10, *In re Marriage Cases* (Cal. App. 1 Dist., Feb. 10, 2006) 2006 WL 937634.) We do not here assert the state's interest in marriage is grounded in negative views about gay people or their families. Instead we argue that marriage has a historic public and legal purpose which is not only rationally related, but deeply rooted in facts specific and unique to opposite sex couples: Marriage is a sexual union of male and female because only such a union can both produce the next generation and connect those children to their natural mother and father. Changing the "definition and conception" of marriage to a unisex relationship, is not merely "opening" the existing institution to new entrants, but a fundamental altering of its core conception, which requires a repudiation of procreation and paternity as a key public purpose.

Consequently we argue that California's marriage laws withstand not only the rational basis test, but heightened scrutiny.

Drawing upon our collective expertise in a variety of professional disciplines, we seek to offer this court a more comprehensive scholarly and legal perspective of the purposes of marriage, and how the current law furthers those purposes, than has been articulated by the parties. In doing so, we present argument which supplements, and does not repeat, that presented by the Appellees.

For these reasons, we seek permission to file a brief amici curiae in support of the Appellees.

Respectfully submitted,

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SUMMARY OF ARGUMENT

The Court of Appeal erred in refusing to consider "procreation and paternity" as a primary purpose of marriage in the State of California, in part because the Attorney General seriously mischaracterized the argument offered by our brief.

We do not here assert the state's interest in marriage is grounded in negative views about gay people or their families. Instead we argue that marriage has a historic public and legal purpose which is not only rationally related, but deeply rooted in facts specific and unique to opposite sex couples: Marriage is a sexual union of male and female because only such a union can both produce the next generation and connect those children to their natural mother and father. Changing the "definition and conception" of marriage to a unisex relationship, is not merely "opening" the existing institution to new entrants, but a fundamental altering of its core conception, which requires a repudiation of procreation and paternity as a key public purpose. Consequently we argue that California's marriage laws withstand not only the rational basis test, but heightened scrutiny.

We are aware of the hurdles we face when the Attorney General has specifically repudiated our brief, even if in this case (we believe) by mischaracterizing its argument, by lumping it with other amici who do

make arguments based on negative views of homosexuality. We ask the chance to offer to this Court clear, powerful and extensive legal evidence that marriage in the state of California has long had a primary purpose of procreation, and that arguments to the contrary by Petitioners or the Attorney General are unsubstantiated.

Given that Proposition 22 was passed by the people at large, this Court has a special obligation in common honesty to consider the arguments here made, for at the very least they are a large part of what the State inarticulately dubs the "tradition" of marriage in California. At a minimum, this Court owes the millions of Californians who voted to uphold this conception of marriage a careful consideration of the real issues at stake.

In addition, the Court has a basic obligation to consider the relationship between marriage and procreation as well in light of the Petitioners' appeal to marriage as a fundamental human right; for (unlike a statute's purpose), the Executive Branch's opinions as to the scope, nature, or essential legal attributes of a fundamental human right are entitled to no special deference by this Court.

The State in other words has no special authority to repudiate the evidence we wish to offer for this Court's consideration:

Absent this connection to procreation and paternity, marriage in law becomes virtually unintelligible: A human right to have the government

regulate and give a Good Housekeeping Seal of Approval on your most intimate, personal, private and sacred relationships, if and only if they are (a) sexual relations and (b) not close family members, and (c) only come in pairs? What possible justification can the government have for insisting that adult love come in this form and for dispensing special benefits only to adults who agree to live by and through this form? Unintelligibility and inarticulateness are the results of ignoring the clear, long, extensive legal record on the public purpose of marriage (as distinct from its many private uses).

We respectfully ask this Court to consider carefully the arguments and evidence laid out herein, for the Court shall receive this critical information from no other source. Indeed, in justice, it must be considered.

ARGUMENT

I. THE APPELLATE COURT ERRED IN REFUSING TO CONSIDER PROCREATION AS A PUBLIC PURPOSE OF MARRIAGE

A. The court below erred in concluding that, under the rational basis test, it need only consider those interests endorsed by the Attorney General.

The Court of Appeal erred in refusing to consider "responsible procreation," as a potential rationale for the law on grounds that this

interest had been "expressly disavowed" by the Attorney General. (*In re Marriage Cases* (2006) 49 Cal. Rptr. 3d 675, 724 at n.33.)

Under strict scrutiny, the burden shifts to the state to demonstrate that the classification drawn by the law is necessary to advance some compelling state interest. (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299.) To meet this burden, the state must identify the *actual* purpose of the law. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 38 [quoting *Shaw v. Hunt* (1996) 517 U.S. 899, 908].)

By contrast, under rational basis review, the Petitioners carry the burden "to negative every conceivable basis which might support [the challenged classification]." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201 [quoting *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315].) As this Court stated in *Warden v. State Bar* (1999) 21 Cal.4th 628, the statutory classification must be upheld "*if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*" (*Id.* at p. 644, emphasis in original, citations omitted) [quoting *FCC v. Beach Communications, Inc., supra* 508 U.S. at p. 313].) At minimum, a test considering "any reasonably conceivable" rationale clearly includes those presented to the court by amici.[1]

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[1] The general rule that "issues not raised by the appealing parties may not be considered if raised for the first time by amici curiae" (*Mercury Casualty Co. v. Hertz Corp.* (1997) 59 Cal.App.4th 414, 425) is not at issue here. Amici are not raising any new question or issue on appeal, but rather

B. The Attorney General overstepped his rightful authority by unilaterally repudiating procreation, a state interest that has been clearly and repeatedly affirmed in the law of California and sister jurisdictions.

The public purpose pointed to by amici—procreation and paternity—has been repeatedly affirmed by California courts, the courts of sister states, and the U.S. Supreme Court. It is deeply embedded in the legal record and legal structure of marriage in California. (See Section II, *infra.*)

Under these circumstances the mere unsubstantiated assertion on the Attorney General's part that this state interest has been repudiated cannot suffice to do justice to the people of California who voted to reaffirm our marriage tradition in voting for Proposition 22.

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assisting the Court with an additional perspective on the issues already raised by the parties, providing the Court with a "conceivable basis" in support of the marriage classification. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn.14 ["Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions."].) Secondly, in this particular case, even if it were not raised by amici, the Court should consider procreation as a purpose of marriage on its own initiative, because it is the "first purpose" of marriage clearly articulated in California case law for more than 100 years. (See, e.g., *Baker v. Baker* (1859) 13 Cal. 87, 103.) Finally, even if amici were deemed to be raising a new issue on appeal, the rule is not absolute, and the Court "has discretion to consider new issues raised by an amicus curiae that concern only matters of law and involve important issues of policy." (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1310, fn. 5.) The arguments presented herein by amici should be considered by the Court in that they can be decided as a matter of law, and clearly involve issues of important public policy.

When did the state of California repudiate procreation and paternity as a purpose of marriage? We have scoured the record and can find no clear answers from the Attorney General. In the Court of Appeal, our brief was lumped with other amici who urge negative views about gays and lesbians as parents or partners, which is no part of the argument we here make. The attorney general thus described our argument as one of several based on the idea that gays and lesbians are "unfit for marriage" and thus would harm the institution, an idea California public policy rejects. (State Appellants' Response to Amicus Curiae Briefs, 2006 WL 937634 at p. 8, *In re Marriage Cases* (2006) 49 Cal. Rptr. 3d 675.

He is simply wrong in describing our argument. It is not based on the idea that gays and lesbians are "unfit for" or will do something harmful to marriage. It is based on the idea that the public redefinition of marriage by this Court would harm marriage, by clearly and fundamentally altering its legal and public conception, so that it is no longer in law related to the need to bring men and women together to make and raise the next generation, in the process unjustly stigmatizing as irrational or hate-filled bigots those Californians who remain attached to this ancient conception of marriage. This would be a great injustice to the people of California and harmful to the state's interests in marriage.

The Attorney General's second argument is that "California statutory law and decisions by California courts have consistently

recognized that same-sex couples are raising families, and that those families need and deserve legal protections."[2] We agree with this description of California family law, but we do not understand how this fact constitutes a repudiation of procreation as a primary purpose of marriage in California law.

Throughout its history, California law has always recognized that people besides married couples raise families and has sought in various ways to facilitate or protect those relationships. **Marriage has never been the sole way to create a family, or a parent-child relationship in the state of California.** Indeed, Petitioners themselves note that "California's adoption statutes have always permitted adoption without regard to the marital status of prospective adoptive parents." (Tyler-Olson Open. Br. at p.14 [quoting *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433].)

Yet throughout this long period, this Court understood one of the key public purposes of marriage in law was procreation: that sexual unions between men and women are different from other kinds of relationships because of their powerful tendency to produce babies. For both individuals and the state this is a double-edged sword: both a gift and burden,

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[2] State Appellants' Response, *supra*, 2006 WL 937634 at p. 9 (citing Stats. 2003, ch. 421, § 1(b) ["Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships. . . ."]; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 439 [observing that the decision to allow second- parent adoption by domestic partner of a birth mother "encourages and strengthens family bonds."].)

depending on the circumstances. But it is a basic human reality that the legislature and the people of California are entitled to notice.

California law seeks to protect children in all family situations, including those of gay people. This fact does not imply the state has no further interest in whether men and women come together to raise the children of their sexual unions together. (*Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 844 [quoting *Caban v. Mohammed* (1979) 441 U.S. 380, 391] ["There is no dispute that 'The State's interest in providing for the well-being of illegitimate children is an important one.' Although the legal concept of illegitimacy no longer exists in California, the problems and needs of children born out of wedlock are an undisputed reality. The state has an important and valid interest in their well-being."] [citations omitted].)

Nor does it imply that the State no longer cares whether children's ties to their natural parents are respected and encouraged, where possible.

> The child has a genetic bond with its natural parents that is unique among all relationships the child will have throughout its life. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility."

(*Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 848 [quoting *Lehr v. Robertson* (1983) 463 U.S. 248, 256].)

The people of California are entitled, through their laws, to express care and concern about all children without thereby repudiating the special function of marriage. "The state's policy in favor of marriage, however, does not imply a corresponding policy *against* nonmarital relationships." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 281 (dis. opn. of Broussard, J.) [quoting *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 14 (dis. opn. of Broussard, J.)].)

C. The Attorney General is not entitled to special deference by this Court in predicting the likely changes in the public meaning of marriage as a result of its redefinition.

Is procreation (understood to include the sexual generation of children in such a way that children receive the care, love and nurture of both their mother and father) still a key public purpose of marriage in California? This is the question on which the Attorney General's opinion is normally entitled to special weight. Yet we can find no clear answer to this question in the record.

If the Attorney General's answer (as it appears to us to be) is "no, procreation has been repudiated as a purpose of marriage in California," the question becomes: when and on what evidence? Given the extensive legal record repeatedly affirming procreation as a purpose of marriage (See Section II.A., *infra*), and the millions of Californians who went to the polls in defense of this marriage tradition, surely the Court cannot in justice

permit mere unsubstantiated assertion to prematurely blind it from considering all the evidence.

Perhaps the Attorney General meant something like "Yes, procreation is a key public purpose of marriage, but redefining marriage so that it is no longer a union of husband and wife in law and culture will have no effect on that public understanding of what marriage is for, and thus will not hurt the state's interest." This, we submit, is "wild speculation" on the Attorney General's part. (Cf. State Appellants' Response to Amicus Curiae Briefs, 2006 WL 937634 at p. 8, *In re Marriage Cases* (2006) 49 Cal. Rptr. 3d 675 [dismissing arguments of amici curiae as "wild speculations about potential harm to the institution of marriage"].) Or to speak rather more courteously, it is a legislative judgment on which the Attorney General's opinion is no better or worse (or at any rate no more entitled to special deference by this Court) than that of any other Californian.

The special deference owed by the Court to the Attorney General extends only to his expertise in defining the state interests promoted by a law. In this case we argue his authority is not unlimited—in the presence of persuasive evidence from the legal record that procreation is a public purpose of marriage, long and repeatedly affirmed, the mere assertion of the Attorney General that it is not a state interest cannot in justice be presumed definitive by this Court, and so prevent it from examining the legal record.

But in no case does our constitutional system presume that the Attorney General has exclusive wisdom to offer evidence to this court about how a change in law of this magnitude might impair a recognized state interest.

This Court has the authority and the responsibility to decide whether, if procreation is a key public purpose of marriage, a rational legislator (or voter) could conclude that redefining marriage harms this interest, or, alternatively if the Court applies heightened scrutiny, whether this interest is sufficiently compelling and the classification narrowly tailored. In making this judgment, this Court ought in justice to consider all the arguments presented to it, and not permit the Attorney General to narrow its vision prematurely.

D. Even if the Court defers to the Attorney General's authority, it must still consider procreation and paternity as a key purpose of marriage because these are a substantive part of the marriage tradition in the minds of the people of California, which the State argues the marriage law seeks to respect and protect.

One of the statutes under question (Calif. Fam. Code § 308.5 ["Proposition 22"]) was not passed by the legislature. It was passed, just seven years ago, by more than 60 percent of Californians. (California Secretary of State, March 2000 Primary Election Results, State Ballot Measures Proposition No. 22, available at http://www.sos.ca.gov/elections/sov/2000_primary/contents.htm [last

visited September 11, 2007]). The initiative statute provisions of the California Constitution (Calif. Const. art. II, §§ 8, 10) are designed to permit the broad consensus of the California people to rule, and it is their understanding of the purpose of marriage as the union of husband and wife that this Court is obliged to consider.

The idea that marriage has as one of its core justifications the creation and nurture of the next generation by their own mother and father is not some obscure dead letter buried in old law texts. It is not, in other words, "invent[ing] fictitious purposes that could not have been within the contemplation of the Legislature [or in this case, the People]." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 648; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201.) Procreation and paternity is not an obscure or absurd argument pulled out of a hat to confound gay marriage advocates (although we are aware many perceive it this way). It is the deep, broad reason why marriage in our tradition and in virtually every human culture is a sexual union of male and female.

The many people in California deeply attached to this traditional conception of marriage are entitled to expect the Court will at least consider the idea that it is rational for them to be concerned about changing the "definition and conception" of marriage and that concerns other than irrational animus may be motivating their desire to retain the traditional understanding of marriage.

At a minimum, this Court owes to the many Californians still deeply attached to this idea of marriage, an open explanation of when and how marriage ceased at law to be about procreation; to do even this minimum the Court must consider the record and evidence offered here.

E. No other proffered public purpose for marriage justifies the intrusion into intimate decisionmaking inherently a part of the special status of marriage.

Consider more indirect evidence that procreation is in fact a key public purpose of marriage: What possible other purpose powerful enough to justify governmental intrusion into people's intimate lives, by giving carrots only to those who love in a certain way?

If this Court willfully blinds itself the real "facts on the ground" that give rise to marriage, "civil marriage" becomes virtually unintelligible: A human right to have the government give a Good Housekeeping Seal of Approval to your most intimate, personal, and sacred relationships, if and only if they are (a) sexual relations and (b) not close family members, and (c) only come in pairs? What possible justification can the government have for dispensing special benefits only to adults who agree to live by and through this form?

The proferred alternative rationale for marriage—a state-sanctioned declaration of "the highest form of love"[3]—is, to put it mildly, odd. What business has the state of California determining for its citizens that the highest form of love is an exclusive sexual union of two people? If 'ordered liberty' means anything surely it means each individual has the right to define for him or herself what the 'highest form of love' consists of.

Unintelligibility and inarticulateness are the results of ignoring the clear, long, extensive legal record on the public purpose of marriage (as distinct from its many private uses): marriage as a natural human right, codified by California law, is the union of husband and wife, because only such a union can both produce children and connect them to their natural mother and father.

F. The Attorney General is not entitled to special deference by this Court in defining the scope, nature, or essential legal attributes of a fundamental human right.

1. Marriage as a fundamental human right is the right of an adult to enter a sexual union with a member of the opposite sex and to have care and custody of any children that sexual union produces.

Marriage as a fundamental human right is acknowledged by both U.S. and international human rights law to be grounded in its natural

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[3] San Francisco Open. Br. at p.53 ["I wanted my parents to get married because marriage is the way to show the highest form of love to someone."] [Statement of Michael Allen Quenneville, son of one of the plaintiff couples].

relationship to procreation, and this Court does not owe special deference to the executive branch in ascertaining the nature, scope, purpose, and essential legal attributes of a fundamental human right.

> **(A)** ***The Universal Declaration of Human Rights acknowledges that the human right to marry is a natural right of men and women to create families together.***
>
> Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

United Nations, Universal Declaration of Human Rights, Art. 16 §§ 1, 3.

The opposite-sex nature of the union, and its natural, inherent relationship to founding a family, were taken for granted at the time. But more recent court rulings in international courts have affirmed this basic view.

> **(i) The United Nation's Human Rights Committee recognizes the right to marry as intrinsically the right to marry and found a family with a person of the opposite sex.**

Article 23, paragraph 2 of the International Covenant on Civil and Political Rights states "The right of men and women of marriageable age to marry and to found a family shall be recognized."[4] In a recent (2002)

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[4] United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Human Rights*, Art. 23, § 2 (entry into force 23 March 1976).

ruling, the United Nation's Human Rights Committee affirmed that the internationally recognized civil right of marriage created by the treaty confers the obligation on states "to recognize as marriage only the union between a man and a woman wishing to marry each other." *Joslin v. New Zealand*, (Communication No. 902/1999) (17 July 2002), U.N. Doc. CCPR/C/75/D/902/1999.

(ii) The European Court of Human Rights recognizes that the human right to marry is related to the natural ability of men and women to found families.

The European Convention on Human Rights states: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[5] The European Court of Human Rights has repeatedly held that "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex."[6] In 2003, the European Court of Justice acknowledged this reading of Article 12, describing as "fact" that "Article

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[5] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (CPHRFF), art. 12 (also referred to as the "European Convention on Human Rights).

[6] *Rees v. United Kingdom* (1987) 9 E.H.R.R. 56 at ¶49; see also *Cossey v. United Kingdom* (1991) 13 E.H.R.R. 622 at ¶43; *Sheffield and Horsham v. United Kingdom* (1999) 27 E.H.R.R. 163 at ¶66.

12 of the European Convention on Human Rights protects only marriage between two persons of opposite biological sex."[7]

(B)*The U.S. Supreme Court's rulings affirming and describing the fundamental human right to marry assume and affirm this right is importantly related to procreation.*

In articulating the human right to marry, the Supreme Court has clearly articulated the link to procreation. In *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, the Court noted, "Marriage and procreation are fundamental to the very existence and survival of the race." Even earlier, the Court spoke of marriage more generally, linking it to the very existence of civilization: "[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill* (1888) 125 U.S. 190, 211. The Court echoed this view in *Loving v. Virginia,* writing, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia* (1967) 388 U. S. 1, 12 [quoting *Skinner v. Oklahoma, supra* 316 U.S. at p. 541 and citing *Maynard v. Hill, supra,* 125 U.S. 190].) It is hard to see how marriage could be considered fundamental to our very existence and survival if it were not understood to be related to making and caring for the next generation. Moreover in *Loving,* Virginia's argument offering miscegenation as a purpose of interracial marriage bans (in order to keep

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[7] *K.B. v. National Health Service Pensions Agency, et al.* (10 June 2003) Case No. C-117/01, 2003 ECJ CELEX LEXIS 650 at ¶ 55.

races separate and distinct, a purpose properly rejected by the Supreme Court) underscores the extent to which courts understood that the right to marry was intrinsically connected to procreation, for absent this connection the argument becomes unintelligible.

In *Zablocki v. Redhail* (1978) 434 U.S. 374, 383-84, the Court again quoted and cited *Skinner, supra,* 316 U.S. at p. 541, *Maynard, supra,* 125 U.S. at pp. 205, 211, *and Loving v. Virginia, supra,* 388 U.S. at p. 12. The *Zablocki* Court also proceeded to quote *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, noting that the right "to marry, establish a home and bring up children" is part of the constitutional right protected under a Due Process analysis.[8]

As the Maryland Supreme Court recently summarized the U.S. Supreme Court's right to marry jurisprudence:

> All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species. . . . Thus, virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves

[8] Even in *Turner v. Safley* (1987) 482 U.S. 78, although the Court did not specifically include procreation among the list of marital purposes which could be satisfied by inmate marriages, the Court did note that one governmental purpose of marriage is the "legitimation of children born out of wedlock," contrasting this governmental benefit of marriage with the "religious and personal aspects of the marital commitment." (*Id.* at pp. 95-96.) The *Turner* Court's failure to clearly distinguish between the public and the merely private, individual purposes of marriage introduced confusion into the American jurisprudence on the right to marry.

> participation (in ways either intimate or remote) by a man and a woman. *Andersen*, 138 P.3d at 978 ("Nearly all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and child-rearing.").

(*Conaway v. Deane,* No. 44, Sept. Term 2006 (Md., Sept. 18, 2007) 2007 WL 2702132 at p. *27 [quoting *Andersen v. King County* (Wash. 2006) 138 P.3d 963].)

(C) ***California courts have held that the natural human right to marry itself (and not merely the statutes that codify that right) is related to procreation.***

This Court's rulings on the human right of marriage have on multiple occasions agreed with overarching national and international articulations of that fundamental right, holding that "the first purpose of matrimony, *by the laws of nature and society*, is procreation." (*Baker v. Baker* (1859) 13 Cal. 87, 103 [emphasis added].)

This Court's ruling in *Perez v. Sharp* (1948) 32 Cal.2d 711, clearly assumes and affirms that procreation is a key purpose of marriage in California law, even though other sexual and family relationships are legal.

The *Perez* Court specifically noted that:

> Furthermore, there is no ban on illicit sexual relations between Caucasians and members of the proscribed races. Indeed, it is covertly encouraged by the race restrictions on marriage.
>
> Nevertheless, respondent has sought to justify the statute by contending that the prohibition of intermarriage between Caucasians and members of the specified races prevents the

> Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians.

(*Perez v. Sharp, supra*, 32 Cal.2d at p.722.)

In other words, even though it was legal for interracial couples to have sex and to have children, the Court's decision makes it clear that marriage is still in some special way related to procreation. The extensive discussion (and rejection) of the eugenics concerns proffered in defense of the marriage law were never based on the fact that marriage is unrelated to procreation—its relationship to progeny is taken as a given. For example:

> Respondent contends, however, that persons wishing to marry in contravention of race barriers come from the 'dregs of society' and that their progeny will therefore be a burden on the community. There is no law forbidding marriage among the 'dregs of society,' assuming that this expression is capable of definition. If there were such a law, it could not be applied without a proper determination of the persons that fall within that category, a determination that could hardly be made on the basis of race alone.

(*Id.* at p. 724.)

> Again:
>
> Respondent contends that even if the races specified in the statute are not by nature inferior to the Caucasian race, the statute can be justified as a means of diminishing race tension and *preventing the birth of children* who might become social problems."
>
> *(Ibid.* [emphasis added].)[9]

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[9] See also *Perez v. Sharp, supra,* 32 Cal.2d at p. 726 ["It is contended that interracial marriage has adverse effects not only upon the parties thereto but

Similarly the fundamental right to marry considered by the Court was clearly presumed to be intimately related to procreation:

> The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. Indeed, 'We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.'

Perez at 715 (quoting *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541).

It is hard to see how this Court could have concluded that marriage is fundamental "to the very existence and survival of the race," if its critical functions did not include managing the procreative potential of sexual unions successfully. And once again the Court took for granted, while dismissing the eugenics provisions offered in support of bans on interracial marriage as race classifications, the long-embedded assumptions about the relationship between marriage and procreation that alone render these arguments intelligible.

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upon their progeny. Respondent relies on *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000, for the proposition that the state 'may properly protect itself as well as the children by taking steps which will prevent the birth of offspring who will constitute a serious social problem, even though such legislation must necessarily interfere with a natural right.' That case, however, involved a statute authorizing sterilization of imbeciles following scientific verification and the observance of procedural guarantees. . . . The racial categories in the miscegenation law are as illogical and discriminatory as those condemned by the Supreme Court in *Skinner v. Oklahoma*; and there is a corresponding lack of a fair hearing."].

II. CALIFORNIA COURTS HAVE REPEATEDLY AFFIRMED THAT PROCREATION IS A PRIMARY PURPOSE OF MARRIAGE.

It is simply not credible to state that marriage has never been about procreation, but was instead "designed to discriminate against lesbians and gay men." (San Francisco Open. Br. at p. 58.)

A. California court rulings have repeatedly affirmed that procreation is a primary purpose of marriage in California law.

Procreation has long been held a key purpose of marriage in California. For example in *Baker v. Baker* (1859), Justice Field, writing for this Court, held that "the first purpose of matrimony, by the laws of nature and society, is procreation." (*Baker v. Baker* (1859) 13 Cal. 87, 103.) In *Sharon v. Sharon* (1888) the Court cited a treatise stating "the procreation of children under the shield and sanction of the law" is one of the "two principal ends of marriage." (*Sharon v. Sharon* (1888) 75 Cal. 1, 33 [quoting Stewart on Marriage and Divorce, sec. 103].)

This interest of the state linking marriage and procreation was spelled out in *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863-64:

> The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.

The Second Appellate District held, in *Vileta v. Vileta* (1942), "[The] concealment of . . . sterility is a fraud that vitiates the marriage contract." (*Vileta v. Vileta* (1942) 53 Cal.App.2d 794, 796.) Three years later, the court quoted *Baker*, holding that the "first purpose of matrimony, by the laws of nature and society, is procreation." (*Schaub v. Schaub* (1945) 71 Cal.App.2d 467, 478.)

In *Aufort v. Aufort*, the Court of Appeals, again quoting *Baker*, declared: "Again, the first purpose of matrimony, by the laws of nature and society, is procreation." (*Aufort v. Aufort* (1935) 9 Cal. App. 2d 310, 311.) In *Maslow v. Maslow*, the Second Appellate District flatly called procreation "[o]ne of the prime purposes of matrimony." (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 241.)

B. The law of marital annulments provides strong legal evidence that procreation goes to the essential of the marriage contract under California law.

Further evidence comes from the law of marital annulments. California courts have repeatedly ruled that misrepresentations of one's capacity or willingness to procreate are grounds for annulment. (See, e.g., *In re Marriage of Meagher and Maleki* (2005) 131 Cal.App.4th 1 ["[A]nnulments on the basis of fraud are generally granted only in cases where the fraud related in some way to the sexual or procreative aspects of marriage."]; *Mayer v. Mayer* (1929) 207 Cal. 685, 695 [annulment may be

granted where one party conceals intent not to consummate the marriage]; *Aufort v. Aufort* (1935) 9 Cal.App.2d 310 [annulment granted where one spouse concealed known sterility from the other]; *Vileta v. Vileta* (1942) 53 Cal.App.2d 794 [annulment granted where one spouse concealed known sterility from the other].)

But marital annulments are profoundly discouraged at law. (*Bruce v. Bruce* (1945) 71 Cal.App.2d 641, 643 ["It is settled law in this state that a marriage may only be annulled for fraud if the fraud relates to a matter which the state deems vital to the marriage relationship."].) Material fraud is not enough. Courts will not annul a marriage on the basis of fraudulent representations regarding love, money, or character.[10] Courts have even found that, although sexually transmitted diseases are grounds for

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[10] *See, e.g., Marshall v. Marshall* (1931) 212 Cal. 736 [petition for annulment denied where based only on misrepresentation as to husband's wealth]; *Gerardi v. Gerardi* (D.D.C. 1946) 69 F. Supp. 296, 296-97 [denying annulment when defendant husband wrote, "To tell the truth I was never in love with you, but it was good while it lasted"]; *Williams v. Williams* (Del. Super. Ct. 1922) 118 A. 638, 639 [denying annulment when husband had falsely represented himself to be "a man of large independent means [who] controlled certain patents which, of themselves, would make him wealthy"]; *Heath v. Heath* (N.H. 1932) 159 A. 418, 425 [denying annulment when "the charges of falsehood are of sober and industrious habits and sexual virtue in respect to character, of savings in respect to material worth, and of law-abiding conduct when there had been a conviction for the crime of adultery"]. Courts appear to have made an exception to this general rule, however, when one party has concealed a prior felony conviction. *Douglass v. Douglass* (1957) 148 Cal.App.2d 867.

annulment, concealment of diseases that do not affect the sexual relation are not.[11]

As Ira Ellman, Paul Kurtz, and Elizabeth Scott explain in their recent family law treatise:

> [C]ourts are very reluctant to grant fraud annulments. Rather than applying ordinary contracts doctrine, under which fraud exists if either party make a material misrepresentation causing the other's consent, courts traditionally require a misrepresentation concerning the "essentials" of marriage. . . misrepresentations concerning wealth, temper or character ordinarily are not grounds for annulment. By contrast, misrepresentation about a party's fertility, or willingness or ability to engage in sexual relations, goes to the essentials.

(Ellman, et al., *Family Law: Cases, Texts, Problems* (3d ed. 1998) at pp. 118-19.)

Thus, the fact that California courts have consistently found that misrepresentations about the capacity or willingness to procreate are grounds for annulment is unusually powerful evidence that procreation is a key purpose of marriage in the state of California.

This Court's current analysis must begin by recognizing that for many generations past, in cases far removed from any possible animus

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[11] See, e.g., *Nerini v. Nerini* (Super. Ct. 1943) 11 Conn. Supp. 361, 367 ["misrepresentations concerning one's health . . . are immaterial unless they involve the essentialia to the marriage relation such as a physical impediment making impossible the performance of the duties and obligations of the relation or rendering its assumption and continuance dangerous."]; see also *Lyon v. Lyon* (Ill. 1907) 82 N.E. 850; *Richardson v. Richardson* (Mass. 1923) 140 N.E. 73; *Lapides v. Lapides* (N.Y. 1930) 171 N.E. 911 [each denying an annulment where one party had concealed his or her epilepsy].

towards gays and lesbians, Californians in law and society have routinely asserted that one of the key purposes of marriage law is procreation.

C. The legal structure of marriage in California points to its relationship to procreation.

Evidence of this public purpose is built into the very legal structure of marriage. The legal elements of marriage in California that point to procreation and paternity as a key purpose include its definition: not just any committed and caring relationship of adults, but a sexually exclusive union of male and female, in which the law presumptively holds mother and father jointly responsible for any children born to the wife. (Calif. Fam. Code § 7540.) Moreover, this presumption of paternity is rebuttable by a finding that the father is not the biological parent of the child, clearly connecting the sexual relationship of the adults to the biological capacity to create new life, and the joint parenting responsibilities of the married couple. (Calif. Fam. Code § 7541(a).) Similarly, the prohibitions on consanguinity also point to the State's conception of marriage as a sexually exclusive union that can and often does give rise to children. (Calif. Fam. Code § 2200 [Incestuous marriages].)

If, as Petitioners suggest, the purpose of marriage in California is primarily a state-sanctioned declaration of personal love and commitment, then marriage clearly fails their own rational basis standard for both same-sex and opposite-sex couples, since there are many single people in loving

and committed relationships, some married people who are not especially loving, and many kinds of loving, intimate and familial relationships that involve more than two people that are not recognized as marriages, or offered its governmental benefits.

D. California's marriage law is part of a broader legal tradition; Rulings in other states and in the federal courts also clearly establish that procreation is one of the key state purposes in marriage

Courts throughout the United States clearly and repeatedly asserted procreation as a key state interest in marriage, even though, throughout this period, sterility or age was never a bar to marriage.

Numerous courts from across the country have articulated the same understanding of the purpose of the law of marriage, for example:[12] *Poe v. Gerstein* (5th Cir. 1975) 517 F.2d 787, 796 ["[P]rocreation of offspring could be considered one of the major purposes of marriage. . . ."]; *Singer v. Hara* (Wash. App. 1974) 522 P.2d 1187, 1195 ["[M]arriage exists as a protected legal institution primarily because of societal values associated

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[12] Courts throughout the United States clearly and repeatedly asserted procreation as a key state interest in marriage, even though, throughout this period, sterility or age was never a bar to marriage (although impotence was). See Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage* (2002) 102 Colum. L. Rev. 1089, 1109 ["No state permits annulment or divorce on the basis of infertility per se. Courts have, not surprisingly rejected claims that 'impotence' encompasses those who have the capacity to copulate but are infertile."]. As an 1898 New York court put it, "[I]t has never been suggested that a woman who has undergone [menopause] is incapable of entering the marriage state." (*Wendel v. Wendel* (2d Dept. 1898) 30 A.D. 447, 449.)

with the propagation of the human race."]; *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185, 186, *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) ["The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."]; *Heup v. Heup* (Wis. 1969) 172 N.W.2d 334, 336 ["Having children is a primary purpose of marriage."]; *Zoglio v. Zoglio* (D.C. App. 1960) 157 A.2d 627, 628 ["One of the primary purposes of matrimony is procreation."]; *Stegienko v. Stegienko* (Mich. 1940) 295 N.W. 252, 254 [stating that "procreation of children is one of the important ends of matrimony"]; *Gard v. Gard* (Mich. 1918) 169 N.W. 908, 912 ["It has been said in many of the cases cited that one of the great purposes of marriage is procreation."]; *Grover v. Zook* (Wash. 1906) 87 P. 638, 639 ["One of the most important functions of wedlock is the procreation of children."]; *Adams v. Howerton* (C.D. Cal. 1980) 486 F. Supp. 1119, 1124, aff'd on other grounds (9th Cir. 1982) 673 F.2d 1036 [observing that a "state has a compelling interest in encouraging and fostering procreation of the race"); *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 337 (Ferren, J., concurring and dissenting) [finding that this "central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples"].

E. Virtually every known human society also links marriage with procreation and paternity.

Moreover, marriage is a virtually universal human institution. Although marriage traditions vary greatly, marriage is everywhere recognizably related to furthering the goals of procreation and paternity. "Although the details of getting married – who chooses the mates, what are the ceremonies and exchanges, how old are the parties – vary from group to group, the principle of marriage is everywhere embodied in practice. . . . The unique trait of what is commonly called marriage is social recognition and approval . . . of a couple's engaging in sexual intercourse and bearing and rearing offspring." (Kingsley Davis (ed.), *Contemporary Marriage: Comparative Perspectives on a Changing Institution* (New York: Russell Sage Foundation, 1985) p. 5.)[13]

Even societies that institutionalized same-sex relations in some contexts did not typically define these relations as marriages.[14] Even these societies recognized the need for a distinct social institution dedicated to

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[13] See also, Helen Fisher, *Anatomy of Love: A Natural History of Mating, Marriage and Why We Stray* (1992) pp. 65-66; George P. Murdock, *Social Structure* (1949).

[14] For example, "Transgenerational homosexual relations have been studied most thoroughly in New Guinea and parts of island Melanesia, where, in a number of cultures, they are a part of boys' initiation rites, and are thus fully institutionalized. . . . After leaving his mother's hut at age twelve to thirteen to take up residence in the men's house, Marind-Anim boy enters into a homosexual relationship with his mother's brother, who belongs to a different lineage from his own. The relationship endures for roughly seven years, until the boy marries." (David F. Greenberg, *The Construction of Homosexuality* (University of Chicago Press, 1988) pp. 27-28.)

managing sexual relationships between men and women in the interests of securing procreation and paternity.

In this sense, and as a matter of historical record, marriage is clearly not rooted in animus towards gay and lesbian people or their relationships. It has its own historic dignity and purpose, rooted in real and enduring human realities.

We are perhaps belaboring the obvious in pointing out how deeply, and in how many ways in the legal record, marriage in California and the United States has always been both held and assumed to be related to procreation. We are forced to do so because what is obviously in the record has been ignored by the appellate court, which did not so much reject the argument as refuse even to consider the powerful evidence for it.

F. The state interest in marriage known as "procreation" does not consist of encouraging reproduction in any and all circumstances, but rather encouraging reproduction in family unions where children will be raised and loved by their own mothers and fathers.

What do these various courts mean by asserting that one key purpose of marriage is procreation? Surely not that, in any literal sense, *only* a husband and wife can make a baby. Human beings (and American courts) have long known that marriage is not technically required for making a baby, that sexual acts outside of marriage can and frequently do produce children.

Instead, courts and society have seen marriage to be about two related things: procreation and paternity, or creating children who are raised by their own mothers and fathers in the same family union. As one commentator notes, "This concern with illegitimacy was rarely spelled out, but discerning it clarifies why courts were so concerned with sex within marriage and renders logical the traditional belief that marriage is intimately connected with procreation even as it does not always result in procreation." (Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage* (2002) 102 Colum. L. Rev. 1089, 1114-15.)

Marriage thus simultaneously encourages procreation in the ideal context and reduces the number of men and women at risk of producing children outside of wedlock, where children in fatherless households would suffer disadvantages and hardships themselves, and at the same time impose financial hardships and social costs on third parties and society.[15]

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[15] "Divorce and unwed childbearing create substantial public costs paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration costs incurred in regulating post-divorce or unwed families; higher foster care and child protection services; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs. While no study has yet attempted precisely to measure these sweeping and diverse taxpayer costs stemming from the decline of marriage, current research suggests that these costs are likely to be quite extensive." (*The Marriage*

The fact that men and women can and do procreate outside of marriage is not evidence that marriage is not really about procreation. To the contrary, this is the very problem that, in this and every known human society, marriage as a social institution, and a special legal status, attempts to ameliorate.

We are not arguing that procreation is the only justification for marriage. American jurists were drawing on an older common law tradition that had roots in long-standing philosophical discourse that understood the word "procreation" to refer to more than the mere physical generation of children's bodies.

> Procreation, however, means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living—a common Stoic sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children.

(John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage* (2001) 76 Notre Dame L. Rev. 1019, 1035.)

This historic cultural synthesis, which views marriage as a loving sexual union that has as a core purpose encouraging men and women to make and rear the next generation together, continues to hold. (See Norval D. Glenn, *With this Ring: A Survey on Marriage in California* (National

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Movement: A Statement of Principles (New York: Institute for American Values, 2000).)

Fatherhood Initiative: Gaithersburg, MD, 2004) pp. 18-19 (available at https://www.fatherhood.org/marriagesurvey.asp) (last visited September 10, 2007) [75 percent of Californians agree that marriage should both promote adult happiness and "produce[ ] children who are well adjusted and who will become good citizens."].)

The claim that this link between marriage as a male-female sexual bond and procreation is today so irrational that no sane or well-intentioned legislator could ever entertain it and that procreation is *merely a pretext* for other, more invidious and undeclared motives is difficult to credit. As the New York Court of Appeals recently held in *Hernandez v. Robles,* "A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." (*Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, 8.)

Moreover, the *Goodridge* decision finding no rational relation between marriage and procreation is a notable exception in American law. (*Goodridge v. Dept. of Publ. Health* (Mass. 2003) 798 N.E.2d 941.) At least eight other state and federal courts within the last ten years have ruled there is a rational relation between the states' definition of marriage and procreation, including recent decisions from the high courts of Maryland, New York, and Washington, as well as the U.S. Court of Appeals for the 8th Circuit. (*Conaway v. Deane,* No. 44, Sept. Term 2006 (Md., Sept. 18, 2007) 2007 WL 2702132; *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1;

Andersen v. King County (Wash. 2006) 138 P.3d 963; *Citizens for Equal Prot. v. Bruning* (8th Cir. 2006) 455 F.3d 859.) As the New York court clearly articulated:

> [T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. . . . . The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.

Hernandez v. Robles (N.Y. 2006) 855 N.E.2d 1, 7.

The Washington Supreme Court came to the same conclusion: "We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both." (*Andersen v. King County* (Wash. 2006) 138 P.3d 963, 985.) The 8th Circuit agreed: "We hold that § 29 and other laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States." (*Citizens for Equal Prot. v. Bruning* (8th Cir. 2006) 455 F.3d 859, 871.) The court held that the Nebraska amendment defining marriage as the union of a man and a woman was related to the state's interest in "steering procreation into marriage," through "laws [that] encourage procreation to take place within

the socially recognized unit that is best situated for raising children." (*Id.* at p. 867.)

The Indiana Court of Appeals explained the connection using a "responsible procreation" analysis: "The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse." (*Morrison v. Sadler* (Ind. App. 2005) 821 N.E.2d 15, 24.)[16]

If these diverse, disinterested judges in many other states can still see a potentially rational relation between procreation and the state's definition of marriage as the union of husband and wife, *then so too could the people of California.* The spirit if not the letter of comity forbids attributing irrationality or malice to so many sister jurisdictions.

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[16] See also *Wilson v. Ake* (M.D. Fla. 2005) 354 F. Supp. 2d 1298, 1309 ["[T]his court … is bound by the Eleventh Circuit's holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest. . . . DOMA is rationally related to this interest."]; *In re Kandu* (Bankr. W.D. Wash. 2004) 315 B.R. 123, 146 ["Authority exits [*sic*] that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern."]; *Standhardt v. Superior Court* (Ariz. App. Div. 1, 2003) 77 P.3d 451, 463-64 (review denied 2004 Ariz. LEXIS 62, May 25, 2004) ["We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."].

G. The State and Petitioners err in asserting the recent developments in California law have repudiated procreation as a public purpose of marriage.

The purpose of a domestic partnership statute is to maximize benefits to same-sex couples while minimizing changes in California's marriage tradition. The decision to retain the traditional understanding of marriage is not primarily a judgment about individuals' moral capacities but rather about the public meaning and purpose of an institution. At law, in our history, and in the current public understanding, "a union of husband and wife" is not the entry requirement into something separate called marriage, but a substantive part of what marriage *is*. Petitioners seek the cultural and social associations of marriage—that is, not the benefits conferred by law (which they have already received), but the shared social understanding in the minds of fellow citizens. The way to achieve that end is to persuade their fellow citizens, and not this Court. [17]

1. California adoption and foster care laws do not repudiate the procreation as a purpose of marriage

[17] See Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 B.Y.U. L. Rev. 555, 560-61 ["[B]ecause social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed and/or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed."].

Adoption and foster care are legal institutions that arise to cope with the consequences of family fragmentation: They exist to protect children, not to further adult interests in creating family forms of choice.[18]

Children available for adoption or foster care typically do not have even one parent able and willing to care for them. The State could reasonably decide that public policy favors any competent adoptive parent or parents for a parentless child, without necessarily affirming or even implying that the State no longer cares whether children of sexual unions, created by bodies in passion, are raised by their natural mother and father.

Indeed, in *Sharon S. v. Superior Court,* the Court noted this child-centered focus, observing: "The basic purpose of an adoption is the 'welfare, protection and betterment of the child,' and adoption courts ultimately must rule on that basis. . . . Second parent adoption can secure the salutary incidents of legally recognized parentage for a child of a nonbiological parent who otherwise must remain a legal stranger." (*Sharon S. v. Superior Court* (2003) 31 Cal. 4th 417, 437.)

III. THE STATE'S DECLARED INTEREST IN MARRIAGE IS NOT ONLY LEGITIMATE, IT IS COMPELLING.

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[18] This child-centered focus of adoption law is well-established in California. Among other requirements, in every adoption the judge must find that "the interest of the child will be promoted by the adoption." (Calif. Fam. Code § 8612.)

Social science evidence supports the conclusion that the state's ongoing interest in marriage is not only legitimate, it is compelling.

A. Procreation is not only a legitimate state purpose but a compelling one.

It is uncontroversial to note that the welfare of children is a compelling governmental interest. In *Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, this Court was even more specific, highlighting the State's interest in protecting children born out of wedlock:

> There is no dispute that "The State's interest in providing for the well-being of illegitimate children is an important one." . . . [T]he problems and needs of children born out of wedlock are an undisputed reality. The state has an important and valid interest in their well-being.
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> (*Id.* at 844 [quoting *Caban v. Mohammed* (1979) 441 U.S. 380, 391].)

If it is true, as the research noted below (section III.D) suggests, that there is something unique about the bond between a child and his or her biological parents, then the legal structure of marriage is the least restrictive means of furthering that compelling interest. Indeed, several courts have reached this conclusion.

In *Adams v. Howerton*, the federal district court simply noted that a "state has a compelling interest in encouraging and fostering procreation of the race." (*Adams v. Howerton* (C.D. Cal. 1980) 486 F. Supp. 1119, 1124, *aff'd on other grounds* (9th Cir. 1982) 673 F.2d 1036.)

B. Society needs babies

There are no signs that artificial reproduction can replace the natural sexual unions of male and female for this purpose. A large majority of modern democracies are now experiencing very low birthrates, causing increasingly urgent concern among scientific experts about the social, economic, and political consequences. The European Union's total fertility rate from 1995 to 2000, for example, was only 1.42 children per woman, sufficiently below the 2.1 replacement level that demographers label this "very low fertility."[19] In 2004, a U.N. demographer warned:

> A growing number of countries view their low birth rates with the resulting population decline and ageing to be a serious crisis, jeopardizing the basic foundations of the nation and threatening its survival. Economic growth and vitality, defense, and pensions and health care for the elderly, for example, are all areas of major concern.

Joseph Chamie, "Low Fertility: Can Governments Make a Difference?" (April 2, 2004) paper presented at the Annual Meeting of the Population Association of America, Boston Massachusetts.

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[19] John C. Caldwell & Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities* (2003) 57(3) Population Studies 241, 241. "Lowest low fertility" is often defined as a total fertility rate of 1.3 or less. Hans-Peter Kohler, et al., *The Emergence of Lowest-Low Fertility in Europe During the 1990's* (2002) 28(4) Population & Development Rev. 641, 641; Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2002 Revision. Highlights* (New York: United Nations, February 26, 2003) at p. 4 (Table 2). North America, by contrast has near-replacement level fertility at 2.01 children per woman. *Id.*

A state interest that if not met jeopardizes "the basic foundation of the nation" and "threatens its survival" certainly must be deemed not only legitimate, but compelling.[20]

C. Sex between men and women still makes babies.

Second, numerous studies have shown that unintended pregnancy remains a common, not rare, consequence of male-female sexual relationships. Nationally, three-fourths of births to unmarried couples were unintended by at least one of the parents.[21] By their late thirties, 60 percent of American women have had at least one unintended pregnancy.[22] Almost 4 in 10 women aged 40-44 have had at least one unplanned birth.[23]

The existence of contraceptives thus does not eliminate the state's interest in encouraging voluntary marital sexual unions between men and women to other kinds of sexual unions between men and women. The vast majority of children born to a married couple will have a mother and a

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[20] See *Adams v. Howerton, supra*, 486 F. Supp. at p. 1124 [observing that a "state has a compelling interest in encouraging and fostering procreation of the race."].

[21] J. Abma, et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth* (National Center for Health Statistics, 1997) 23(19) Vital Health Stat. 28 (Table 17) [70.4 percent of births to married women were intended by both parents, compared to just 28 percent of births to unmarried mothers.].

[22] *Id.* at 28 (Table 3) [finding 60.0% of women aged 35-39 had had at least one unintended pregnancy].

[23] *Id.* at 28 (Table 3) [finding 38.1% of women aged 40-44 had had at least one unplanned birth].

father already committed to caring for them. Most children conceived in sexual unions outside of marriage (and all children of same-sex unions) will not.[24]

D. Children need mothers and fathers.

Child Trends (a leading and respected child research organization) sums up the current social science consensus on common family structures that have been well-studied using large, nationally representative databases:

> Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict

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[24] Studies show that 2 out of 3 children born out of wedlock have nonresident fathers at birth. This percentage climbs as children grow older (though some couples eventually marry). (See, e.g., McLanahan, et al., *Unwed Fathers and Fragile Families* (March 1998) Center for Research on Child Wellbeing, Working Paper #98-12 at p. 7.) An Urban Institute policy brief explains the impact: "Parents who do not live with their children are unlikely to be highly involved in their children's lives." (Elaine Sorensen & Chava Zibman, *To What Extent Do Children Benefit from Child Support?* (The Urban Institute, January 2000) p. 8.) According to the National Survey of America's Families, one in three (34%) children with a nonresident parent saw that parent on a weekly basis in 1997. Another 38 percent saw their nonresident parent at least once during the year, though not on a weekly basis. Fully 28 percent of children with a nonresident parent had *no* contact with that parent during the course of the year. (*Ibid.*) Another review of several national surveys found that, by their mothers' estimates, roughly 40% of children with nonresident fathers saw their father once a month, while nearly the same number did not see their father at all in a given year. (Wendy D. Manning & Pamela J. Smock, *New Families and Non-Resident Father-Child Visitation* (Sept. 1999) 78(1) Social Forces 87, 89; see also Valerie King, *Variations in the Consequences of Nonresident Father Involvement for Children's Well-Being* (1994) 56 J. Marriage & Fam. 963 [finding half of children with nonresident fathers see their fathers only once a year, if at all, while just 21 percent see their fathers on a weekly basis].)

> marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.[25]

The risks to children when mothers and fathers do not get and stay married include: poverty,[26] suicide,[27] mental illness,[28] physical illness,[29]

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[25] Kristin Anderson Moore, et al., "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?" *Child Trends Research Brief* (June 2002) p. 1. This research brief on family structure does not compare outcomes for children raised by same-sex couples to children in other types of families.

[26] Sara McLanahan, *Family, State, and Child Well-Being* (2000) 26 Annual Rev. of Sociology 703; I. Sawhill, "Families at Risk," in H.H. Aaron & R.D. Reischauer (eds.) *Setting National Priorities* (1999) pp. 97-135; Mark R. Rank & Thomas A. Hirschl (1999) *The Economic Risk of Childhood in America: Estimating the Probability of Poverty Across the Formative Years*, 61 J. Marriage & Fam. 1058.

[27] Gregory R. Johnson, et al., *Suicide Among Adolescents and Young Adults: A Cross-National Comparison of 34 Countries* (2000) 30 Suicide & Life-Threatening Behavior 74; David Lester, *Domestic Integration and Suicide in 21 Nations, 1950-1985* (1994) XXXV Int'l J. of Comparative Sociology 131; David M. Cutler, et al., *Explaining the Rise in Youth Suicide* (2000) National Bureau of Economic Research Working Paper 7713.

[28] E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002); Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis* (2001) 15 J. of Fam. Psychol. 355; Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared with Those in Two-Parent Families* (1999) 61 J. Marriage & Fam. 1020; Andrew J. Cherlin, et al., *Effects of Parental Divorce on Mental Health Throughout the Life Course* (1998) 63 Am. Soc. Rev. 239.

[29] Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health* (1988) 29 J. Health & Soc. Behav. 38; Olle Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood* (1993) 36 Soc. Sci. & Med. 1047.

infant mortality,[30] lower educational attainment,[31] juvenile delinquency and conduct disorder,[32] adult criminality,[33] early unwed parenthood,[34] and lower life expectancy.[35]

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[30] J.A. Gaudino, Jr., et al., *No Fathers' Names: A Risk Factor for Infant Mortality in the State of Georgia* (1999) 48 Soc. Sci. & Med. 253; C.D. Siegel, et al., *Mortality from Intentional and Unintentional Injury Among Infants of Young Mothers in Colorado, 1982 to 1992* (1996) 150(10) Archives of Pediatric & Adolescent Med. 1077; Trude Bennett & Paula Braveman, *Maternal Marital Status as a Risk Factor for Infant Mortality* (1994) 26(6) Fam. Planning Perspectives 252; Trude Bennett, *Marital Status and Infant Health Outcomes* (1992) 35(9) Soc. Sci. & Med. 1179.

[31] See, e.g., Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis* (2001) 15(3) J. Fam. Psychol. 355; William H. Jeynes, *The Effects of Several of the Most Common Family Structures on the Academic Achievement of Eighth Graders* (2000) 30(1/2) Marriage & Fam. Rev. 73; Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Helps, What Hurts* (Cambridge, MA: Harvard University Press) (1994); Timothy J. Biblarz & Gregg Gottainer, *Family Structure and Children's Success: A Comparison of Widowed and Divorced Single-Mother Families* (2000) 62(2) J. Marriage & Fam. 533; Zeng-Yin Cheng & Howard B. Kaplan, *Explaining the Impact of Family Structure During Adolescence on Adult Educational Attainment* (1999) 7(2) Applied Behav. & Sci. Rev. 23; Dean Lillard & Jennifer Gerner, *Getting to the Ivy League* (1996) 70(6) J. Higher Educ. 206.

[32] Ross L. Matsueda & Karen Heimer, *Race, Family Structure and Delinquency: A Test of Differential Association and Social Control Theories* (1987) 52 Am. Soc. Rev. 171; Chris Coughlin & Samuel Vuchinich, *Family Experience in Preadolescence and the Development of Male Delinquency* (1996) 58(2) J. Marriage & Fam. 491.

[33] Cynthia Harper & Sara McLanahan, *Father Absence and Youth Incarceration* (August 1998) paper presented at the annual meeting of the American Sociological Association.

[34] E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002); Catherine E. Ross & John Mirowsky, *Parental Divorce, Life-Course Disruption, and Adult Depression* (1999) 61(4) J. Marriage & Fam. 1034; Andrew J. Cherlin et al., *Parental Divorce in*

Research on children raised by same-sex couples is in its beginning stages. We do not have a single study based on nationally representative data that can tell us how the typical child raised from birth by a same-sex couples fares, compared to children in other family structures.[36] If future research shows that such children fare as well as children raised by married biological parents, the most likely explanation will point to the vast difference in the way in which opposite sex and same-sex couples become parents.

Childhood and Demographic Outcomes in Young Adulthood (1995) 32 Demography 299.

[35] J.E. Schwartz, et al., *Childhood Sociodemographic and Psychosocial Factors as Predictors of Mortality Across the Life-Span* (1995) 85 Am. J. Pub. Health 1237; Joan S. Tucker., et al., *Parental Divorce: Effects on Individual Behavior and Longevity* (1997) 73(2) J. Personality & Soc. Psychol. 381.

[36] See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting and America's Children* (Fall 2005) 15(2) Future of Children 97, 104 ["What the evidence does not provide, because of the methodological difficulties we outlined, is much knowledge about whether those studied are typical or atypical of the general population of children raised by gay and lesbian couples. We do not know how the *normative* child in a same-sex family compares with other children."]; Nock Aff. ¶ 3, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. of Justice), available at http://marriagelaw.cua.edu/Law/cases/Canada/ontario/halpern/aff_nock.pdf (last visited September 11, 2007) ["Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to generally accepted standards of scientific research."]; Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications* (1995) 31(1) Developmental Psychol. 130.

The State does not have the same interests at stake in regulating same-sex and opposite-sex sexual unions, because same-sex couples become parents only after much deliberation and joint consultation, at much greater expense, and/or by bringing a potential third party or parties into the relationship. Their sexual unions do not produce children. Meanwhile there remains a pressing urgent need to ensure that children created by acts of passion are protected and cared for by their parents. For better and/or worse, same-sex and opposite sex couples are simply not similarly situated with respect to the great public purposes of marriage.

IV. THE REDEFINITION OF MARRIAGE WOULD RADICALLY TRANSFORM THE PUBLIC NATURE, MEANING AND PURPOSE OF THE INSTITUTION, SEVERING ITS RELATIONSHIP IN THE PUBLIC MIND TO ITS HISTORIC PUBLIC ROLE IN FURTHERING "PROCREATION AND PATERNITY."

As one commentator put it:

> Same-sex marriage in Massachusetts is not merely about opening a new set of legal benefits to more individuals. . . . The meaning of marriage itself must change. . . . The procreative potential of sexual unions must be reduced from the great, brute, obvious, important fact it has been through most of human history, to a minor, not very significant feature of human relationships, largely unrelated to any key purpose of marriage.

(Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* (2004) 2 U. St. Thomas L.J. 33, 59-60.)

Among the consequences reasonably foreseeable by the legislature and the People of California:

A. Marriage will become disconnected from "procreation and paternity" in the public mind.

Many gay marriage advocates argue that same-sex marriage will work a radical transformation in the public understanding of marriage, and they applaud it for that reason.[37] For example, same-sex marriage activist E.J. Graff argues that "[i]f same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers." (E.J. Graff, "Retying the Knot," in *Same-Sex Marriage: Pro and Con: A Reader* (Andrew Sullivan ed., 1st ed., Vintage Books 1997) p. 136.)

Judith Stacey, sociology professor at New York University argues:

> Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and

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[37] As Professor Douglas Kmiec notes, some advocates of same-sex marriage contend that there never has been any link between marriage and procreation, or that such a link no longer exists today. Criticizing such claims, Kmiec writes: "In truth, the advocates of same-sex marriage cannot genuinely mean that procreation has not been, in fact, linked with marriage. Rather, what same-sex partisans actually mean is that they would prefer procreation not to be associated with the marital estate. . . . Sexual reproduction for the human species is not merely one of several equally attractive ways to bring forth a child, it is the assumed way. It is no coincidence that those with religious beliefs that correspond most strongly with a traditional understanding of marriage as linked to procreation do, indeed, have the most children." (Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage* (2004) 32 Hastings Const. L.Q. 653, 660.)

> politics of family life in the United States . . . [P]eople might devise marriage and kinship patterns to serve diverse needs. . . . Two friends might decide to "marry" without basing their bond on erotic or romantic attachment. . . . Or, more radical still, perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance, and labor. After all, if it is true that "The Two-Parent Family is Better" than a single-parent family, as family-values crusaders proclaim, might not three-, four-, or more-parent families be better yet, as many utopian communards have long believed?

Judith Stacey, "Gay and Lesbian Families: Queer Like Us," in Mary Ann Mason, et al. (eds.), *All Our Families: New Policies for a New Century* (Oxford U. Press 1998) pp. 128-29.

Former NYU professor Ellen Willis described same-sex marriage as "an improvement over the status quo," in that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution to its very heart, further promoting the democratization and secularization of personal and sexual life." "For starters, if homosexual marriage is OK, why not group marriage--which after all makes a lot of sense when the economic and social fragility of the family is causing major problems?" (Ellen Willis, contribution to "Can Marriage Be Saved? A Forum," *Nation*, July 5, 2004, pp. 16-17.)

Of course not all gay marriage advocates wish to radically transform the meaning of marriage, but that so many highly credentialed gay marriage

advocates believe that it will, makes it clear it is equally reasonable for the people of California (and state legislators) to express similar concerns.

B. Accepting Petitioners' reasoning on the fundamental right to marry "the person of one's choice" will offer new support for polygamy in culture and possibly law.

If individuals have a right, not only to marry, but to change the legal "definition and conception" of marriage so that it fits their relationships better, polygamists and polyamorists will receive new cultural support. And indeed it is clear that this principle will give powerful new cultural and legal support to polygamy. Petitioners argue to the contrary because (they say) the fundamental right to marry is the right to marry only *one person* of one's choice, and applicants to a polygamous marriage have already exercised that right. Not necessarily. A man who already has one spouse of his choice may not (as Petitioners assert) have a fundamental right to marry a second person of his choice. But the single woman who wishes to marry a man who is already married will in fact be denied her fundamental right to marry the one person of her choice by the laws insisting on monogamy. As the New Jersey Appellate Division explained:

> The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as "compelling and definitive expression[s] of love and commitment" among the parties to the union."

(*Lewis v. Harris* (N.J. Super. App. Div. 2005) 875 A.2d 259 (aff'd as modified, (N.J. 2006) 908 A.2d 196) [quoting George W. Dent, Jr., *The Defense of Traditional Marriage* (Fall 1999) 15 J.L. & Pol. 581, 628].)

In this way, the argument of petitioners is profoundly different from that made in *Perez* and *Loving* about interracial marriage. Interracial marriages were always acknowledged to be a form of marriage (hence racists felt a need to ban them). By contrast Proposition 22 does not bar a class of individuals from entering marriage. (Gay people can and do enter marriages in the state of California; whether or not it is wise or satisfying of them to do so.). Instead Proposition 22 clarifies that marriage in the state of California, by its nature, requires a husband and wife. This is not an entrance requirement, it is part of what the substance of marriage is, what marriage consists of.

V. CALIFORNIA'S DECISION TO PROVIDE CIVIL UNIONS, INSTEAD OF MARRIAGE, FOR SAME-SEX COUPLES IS RATIONALLY RELATED TO PROTECTING THE STATE'S MARRIAGE TRADITIONS

A. Petitioners err in arguing that changing the "definition and conception" of marriage cannot possibly affect the state's interest in furthering procreation and paternity.

Petitioners argue that changing the "definition and conception" of marriage to include same-sex unions cannot possibly affect the state's interest in procreation and paternity because heterosexual couples may still marry. Yes, but the meaning of their marriages, at least the meaning

publicly endorsed by law, will have changed. The principle that the Petitioners ask this Court to endorse under the equal protection claim is that same-sex couples and opposite sex couples are similarly situated for the purposes of marriage. Such a declaration by this Court requires a repudiation of the idea that marriage is intimately rooted in and related to the two great and related ways in which same-sex and opposite sex couples are differently situated: that only unions of husbands and wives can make the next generation and connect that child to his or her own mother and father. The Petitioners' own argument makes it clear that if procreation is a purpose of marriage, getting to same-sex marriage on equal protection grounds requires the state to repudiate that purpose publicly. One could hardly offer more clear evidence that the state's classification is powerfully and substantively related to the state interest so described.

B. Petitioners are incorrect to characterize **Eldon v. Sheldon** *and other cases as holding marriage is not about procreation.*

Petitioners cite *Elden v. Sheldon* (1988) 46 Cal.3d 267, in support of the proposition the primary state interest in marriage is adult love. (San Francisco Ans. Br. at pp. 11-12.) The case involved tort law (loss of consortium, emotional distress), which is necessarily about the private relational interests affected by the loss of a marital partner, and the court in this case had no occasion to comment on the state's interest in procreation in marriage in this case.

Nor does another case cited by the Petitioners, *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, repudiate procreation as a purpose of marriage: it merely affirms the legal commonplace that the state has a "vital public interest" in the marital status of the husband and wife, without very clearly articulating exactly what the "vital public interest" served by marriage is. (*Id.* at p. 287 [quoting *Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 651].) Inarticulateness in an appellate court decision is not repudiation, especially not of a public purpose so deeply imbedded in the legal record. We are unable to find any appellate court decision in California specifically repudiating procreation as a key public purpose of marriage before this case.

C. The Equal Protection right that led to the elimination of distinctions based on legitimacy was not the right of adults to form families in absolutely any manner they choose, but the right of the child to equal protection of the laws regardless of his or her parents' marital status.

Today, the legal concept of illegitimacy has been effectively abolished. (See, e.g., *Susan H. v. Jack S.* (2004) 30 Cal.App.4th 1435, 1440.) The U.S. Supreme Court grounds this right solely in the right of a child not to be penalized by the state because of his or her parents' marital status:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing

> disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

(*Weber v. Aetna Casualty & Surety Co.* (1972) 406 U.S. 164, 175-76.)

Five years later, the Court again affirmed the abolition of legitimacy distinctions was a right of the child, not of the adults:

> In subsequent decisions, we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. . . . The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.

(*Trimble v. Gordon* (1977) 430 U.S. 762, 796-770.)

It would be paradoxical and self-contradictory to grant adults in a same-sex couple the right to marry and attempt to ground that right in the existing Constitutional obligation to provide equal protection for all children regardless of marital status. If California is failing in its obligation to provide equal protection to all its children, regardless of marital status, it cannot remedy that neglect by expanding marital status.

CONCLUSION

In separating the legal benefits conferred by marriage from the cultural institution (or tradition) of marriage itself, the state of California is acting rationally to pursue twin goals: to maximize new legal benefits for

gay couples while minimizing a potentially quite serious threat to those aspects of the public understanding of marriage most related to child and community well-being. In so doing, the legislature is not demonstrating irrational animus, but exercising legislative judgment.

The state interests advanced by marriage are not only legitimate, they are compelling. No same-sex couples can further these interests. Every opposite-sex union does so, at least in the minimal sense. There is no fundamental human right to change the conception of marriage so that it fits ones' own relationships better. To endorse an equal protection claim to marriage requires this Court to repudiate the state's compelling interest in procreation and paternity, because it requires this Court to assert that same-sex and opposite-sex couples are similarly situated with respect to marriage's purposes. Both advocates and opponents of same-sex marriage recognize this truth.

For the foregoing reasons, amici curiae respectfully request that this Honorable Court affirm the judgment of the Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
[Pursuant to California Rules of Court, Rule 8.204(c)(1)]

Pursuant to California Rules of Court, Rule 8.204(c)(1), I hereby certify that the attached BRIEF AMICI CURIAE OF JAMES Q. WILSON, ET AL., LEGAL AND FAMILY SCHOLARS IN SUPPORT OF THE APPELLEES has been prepared using proportionately spaced Times New Roman font, with lines double-spaced, in 13 point typeface. The brief was prepared using Microsoft Word software, and according to the Word Count feature therein, the brief contains 13,823 words, up to and including the signature lines that follow the conclusion of the brief, exclusive of cover, tables, and application for permission to file.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 25, 2007.

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I, _____ declare that I am over the age of eighteen years and am not a party to this action. My business address is 239 Seebold Spur, Manchester, MO 63026.

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CALIFORNIA SUPREME COURT CASE NO. S147999
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CITY AND COUNTY OF SAN FRANCISCO V. STATE OF CALIFORNIA
California Court of Appeal, First Appellate District Case No. A110449
San Francisco County Superior Court Case No. CGC-04-429539

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RYMER ET AL. V. LOCKYER
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PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND V. CITY AND COUNTY OF SAN FRANCISCO
California Court of Appeal, First Appellate District Case No. A110651
San Francisco County Superior Court Case No. CGC-04-503943

Consolidated with
CAMPAIGN FOR CALIFORNIA FAMILIES V. NEWSOM
California Court of Appeal, First Appellate District Case No. A110652
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CLINTON ET AL. V. STATE OF CALIFORNIA, ET AL.

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WHAT IS MARRIAGE?

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What is marriage?

Consider two competing views:

Conjugal View: Marriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioral part of the process of reproduction, thus uniting them as a reproductive unit. Marriage is valuable in itself, but its inherent orientation to the bearing and rearing of children contributes to its distinctive structure, including norms of monogamy and fidelity. This link to the welfare of children also helps explain why marriage is important to the common good and why the state should recognize and regulate it.[1]

Revisionist View: Marriage is the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life. It is essentially a union of hearts and minds, enhanced by whatever forms of sexual intimacy both partners find agreeable. The state should recognize and regulate marriage because it has an interest in stable

1. *See* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1066 (1994); John Finnis, *"Marriage: A Basic and Exigent Good,"* THE MONIST, July–Oct. 2008, 388–406. *See also* PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS 176–97 (2008).

romantic partnerships and in the concrete needs of spouses and any children they may choose to rear.[2]

It has sometimes been suggested that the conjugal understanding of marriage is based only on religious beliefs. This is false. Although the world's major religious traditions have historically understood marriage as a union of man and woman that is by nature apt for procreation and childrearing,[3] this suggests merely that no one religion invented marriage. Instead, the demands of our common human nature have shaped (however imperfectly) all of our religious traditions to recognize this natural institution. As such, marriage is the type of social practice whose basic contours can be discerned by our common human reason, whatever our religious background. We argue in this Article for legally enshrining the conjugal view of marriage, using arguments that require no appeal to religious authority.[4]

Part I begins by defending the idea—which many revisionists implicitly share but most shrink from confronting—that the nature of marriage (that is, its essential features, what it fundamentally is) should settle this debate. If a central claim made by revisionists against the conjugal view, that equality requires recognizing loving consensual relationships,[5] were true, it would also refute the revisionist view; being false, it in fact refutes neither view.

Revisionists, moreover, have said what they think marriage is not (for example, inherently opposite-sex), but have only rarely (and vaguely) explained what they think marriage is. Consequently, because it is easier to criticize a received view than to construct a complete alternative, revisionist arguments have had an appealing simplicity. But these arguments are also vulnerable to powerful criticisms that revisionists do not have the resources to answer. This Article, by contrast, makes a positive case, based on three widely held principles, for what makes a marriage.

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2. *See* Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 279 (1995).

3. Even in traditions that permit or have permitted polygamy, each marriage is between a man and a woman.

4. *See infra* Part II.E.

5. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1424 (1993).

Part I also shows how the common good of our society crucially depends on legally enshrining the conjugal view of marriage and would be damaged by enshrining the revisionist view—thus answering the common question, "How would gay civil marriage affect you or your marriage?" Part I also shows that what revisionists often consider a tension in our view—that marriage is possible between an infertile man and woman—is easily resolved. Indeed, it is revisionists who cannot explain (against a certain libertarianism) why the state should care enough about some relationships to enact any marriage policy at all, or why, if enacted, it should have certain features which even they do not dispute. Only the conjugal view accounts for both facts. For all these reasons, even those who consider marriage to be merely a socially useful fiction have strong pragmatic reasons for supporting traditional marriage laws. In short, Part I argues that legally enshrining the conjugal view of marriage is both philosophically defensible and good for society, and that enshrining the revisionist view is neither. So Part I provides the core or essence of our argument, what could reasonably be taken as a stand-alone defense of our position.

But many who accept (or at least grant) our core argument may have lingering questions about the justice or consequences of implementing it. Part II considers all of the serious concerns that are not treated earlier: the objections from conservatism (Why not spread traditional norms to the gay community?), from practicality (What about partners' concrete needs?), from fairness (Doesn't the conjugal conception of marriage sacrifice some people's fulfillment for others'?), from naturalness (Isn't it only natural?), and from neutrality (Doesn't traditional marriage law impose controversial moral and religious views on everyone?).

As this Article makes clear, the result of this debate matters profoundly for the common good. And it all hinges on one question: *What is marriage?*

I

A. Equality, Justice, and the Heart of the Debate

Revisionists today miss this central question—*what is marriage?*—most obviously when they equate traditional marriage laws with laws banning interracial marriage. They argue that people cannot control their sexual orientation any more than

they can control the color of their skin.[6] In both cases, they argue, there is no rational basis for treating relationships differently, because the freedom to marry the person one loves is a fundamental right.[7] The state discriminates against homosexuals by interfering with this basic right, thus denying them the equal protection of the laws.[8]

But the analogy fails: antimiscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally relevant to the latter question. Because every law makes distinctions, there is nothing unjustly discriminatory in marriage law's reliance on genuinely relevant distinctions.

Opponents of interracial marriage typically did not deny that marriage (understood as a union consummated by conjugal acts) between a black and a white was possible any more than proponents of segregated public facilities argued that some feature of the whites-only water fountains made it impossible for blacks to drink from them. The whole point of antimiscegenation laws in the United States was to prevent the genuine possibility of interracial marriage from being realized or recognized, in order to maintain the gravely unjust system of white supremacy.[9]

By contrast, the current debate is precisely over whether it is possible for the kind of union that has marriage's essential features to exist between two people of the same sex. Revisionists do not propose leaving intact the historic definition of marriage and simply expanding the pool of people eligible to marry. Their goal is to abolish the conjugal conception of marriage in our law[10] and replace it with the revisionist conception.

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6. *See, e.g., id.*

7. *See, e.g., id.*

8. *Id.*

9. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

10. Throughout history, no society's laws have explicitly forbidden gay marriage. They have not explicitly forbidden it because, until recently, it has not been thought possible. What is more, antimiscegenation laws, at least in the United States, were meant to keep blacks separate from whites, and thus in a position of social, economic, and political inferiority to them. But traditional marriage laws were not devised to oppress those with same-sex attractions. The comparison is offensive, and puzzling to many—not least to the nearly two-thirds of black voters who voted to uphold conjugal marriage under California Proposition Eight. *See* Cara Mia DiMassa & Jessica Garrison, *Why Gays, Blacks are Divided on Prop. 8*, L.A. TIMES, Nov. 8, 2008, at A1.

More decisively, though, the analogy to antimiscegenation fails because it relies on the false assumption that any distinction is unjust discrimination. But suppose that the legal incidents of marriage were made available to same-sex as well as opposite-sex couples. We would still, by the revisionists' logic, be discriminating against those seeking open, temporary, polygynous, polyandrous, polyamorous, incestuous, or bestial unions. After all, people can find themselves experiencing sexual and romantic desire for multiple partners (concurrent or serial), or closely blood-related partners, or nonhuman partners. They are (presumably) free not to act on these sexual desires, but this is true also of people attracted to persons of the same sex.

Many revisionists point out that there are important differences between these cases and same-sex unions. Incest, for example, can produce children with health problems and may involve child abuse. But then, assuming for the moment that the state's interest in avoiding such bad outcomes trumps what revisionists tend to describe as a fundamental right, why not allow incestuous marriages between adult infertile or same-sex couples? Revisionists might answer that people should be free to enter such relationships, and all or some of the others listed, but that these do not merit legal recognition. Why? Because, the revisionist will be forced to admit, marriage as such just cannot take these forms, or can do so only immorally. Recognizing them would be, variously, confused or immoral.

Revisionists who arrive at this conclusion must accept at least three principles.

First, marriage is not a legal construct with totally malleable contours—not "just a contract." Otherwise, how could the law get marriage wrong? Rather, some sexual relationships are instances of a distinctive kind of relationship—call it *real marriage*—that has its own value and structure, whether the state recognizes it or not, and is not changed by laws based on a false conception of it. Like the relationship between parents and their children, or between the parties to an ordinary promise, real marriages are *moral realities* that create moral privileges and obligations between people, independently of legal enforcement.[11]

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11. For a brief defense of this idea, and the implications for our argument of denying it, see *infra* Part I.F.

Thus, when some states forbade interracial marriage, they either attempted to keep people from forming real marriages, or denied legal status to those truly marital relationships. Conversely, if the state conferred the same status on a man and his two best friends or on a woman and an inanimate object, it would not thereby make them really married. It would merely give the title and (where possible) the benefits of legal marriages to what are not actually marriages at all.

Second, the state is justified in recognizing only real marriages as marriages. People who cannot enter marriages so understood for, say, psychological reasons are not wronged by the state, even when they did not choose and cannot control the factors that keep them single—which is true, after all, of many people who remain single despite their best efforts to find a mate.

Any legal system that distinguishes marriage from other, nonmarital forms of association, romantic or not, will justly exclude some kinds of union from recognition. So before we can conclude that some marriage policy violates the Equal Protection Clause,[12] or any other moral or constitutional principle, we have to determine what marriage actually *is* and why it should be recognized legally in the first place. That will establish which criteria (like kinship status) are relevant, and which (like race) are irrelevant to a policy that aims to recognize real marriages. So it will establish when, if ever, it is a marriage that is being denied legal recognition, and when it is something else that is being excluded.

As a result, in deciding whether to recognize, say, polyamorous unions, revisionists would not have to figure out first whether the desire for such relationships is natural or unchanging; what the economic effects of not recognizing polyamory would be; whether nonrecognition stigmatizes polyamorous partners and their children; or whether nonrecognition violates their right to the equal protection of the law. With respect to the last question, it is exactly the other way around: Figuring out what marriage is would tell us whether equality requires generally treating polyamorous relationships just as we do monogamous ones—that is, as marriages.

Third, there is no general right to marry the person you love, if this means a right to have any type of relationship that you desire recognized as marriage. There is only a presumptive right

12. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

not to be prevented from forming a real marriage wherever one is possible. And, again, the state cannot choose or change the essence of real marriage; so in radically reinventing legal marriage, the state would obscure a moral reality.

There is a tension here. Some revisionists say that marriage is merely a social and legal construct, but their appeals to equality undermine this claim. The principle of equality requires treating like cases alike. So the judgment that same-sex and opposite-sex unions are alike with respect to marriage, and should therefore be treated alike by marriage law, presupposes one of two things: Either *neither* relationship is a real marriage in the above sense, perhaps because there is no such thing, marriage being just a legal fiction (in which case, why not justify apparent inequities by social-utility considerations?[13]), or both relationships are real marriages, *whatever* the law says about them. The latter presupposition entails the belief, which most revisionists seem to share with advocates of the conjugal view, that marriage has a nature independent of legal conventions. In this way, the crucial question—the only one that can settle this debate—remains for both sides: What is marriage?

B. Real Marriage Is—And Is Only—The Union of Husband and Wife

As many people acknowledge, marriage involves: first, a comprehensive union of spouses; second, a special link to children; and third, norms of permanence, monogamy, and exclusivity.[14] All three elements point to the conjugal understanding of marriage.

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13. This point requires elaboration: Some revisionists might deny that there is a "real marriage" from which any relationship might deviate, and instead maintain that marriage is purely conventional. Those who think marriage is a useless or unjustifiable fiction have no reason to support any marriage law at all, while those who think it is a useful and legitimate fiction must explain why the state should keep even the restrictions on marriage that they support. On this latter point, see *infra* Part II.B. On the implications of regarding marriage as pure construction, see *infra* Part I.F.

14. Among revisionists, see, for example, Jonathan Rauch, *For Better or Worse? The case for Gay (and Straight) Marriage*, THE NEW REPUBLIC, May 6, 1996, at 18, *available at* http://www.jonathanrauch.com/jrauch_articles/gay_marriage_1_the_case_for_marriage; Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. POL. PHIL. 225, 229 (1999); Jonathan Rauch, *Not So Fast, Mr. George*, INDEP. GAY F. (Aug. 2, 2006), http://igfculturewatch.com/2006/08/02/not-so-fast-mr-

1. Comprehensive Union

Marriage is distinguished from every other form of friendship inasmuch as it is comprehensive. It involves a sharing of lives and resources, and a union of minds and wills—hence, among other things, the requirement of consent for forming a marriage. But on the conjugal view, it also includes organic bodily union. This is because the body is a real part of the person, not just his costume, vehicle, or property. Human beings are not properly understood as nonbodily persons—minds, ghosts, consciousnesses—that inhabit and use nonpersonal bodies. After all, if someone ruins your car, he vandalizes your property, but if he amputates your leg, he injures you. Because the body is an inherent part of the human person, there is a difference in kind between vandalism and violation; between destruction of property and mutilation of bodies.

Likewise, because our bodies are truly aspects of us as persons, any union of two people that did not involve organic bodily union would not be comprehensive—it would leave out an important part of each person's being. Because persons are body-mind composites, a bodily union extends the relationship of two friends along an entirely new dimension of their being as persons. If two people want to unite in the comprehensive way proper to marriage, they must (among other things) unite organically—that is, in the bodily dimension of their being.

This necessity of bodily union can be seen most clearly by imagining the alternatives. Suppose that Michael and Michelle build their relationship not on sexual exclusivity, but on tennis exclusivity. They pledge to play tennis with each other, and only with each other, until death do them part. Are they thereby married? No. Substitute for tennis any nonsexual activity at all, and they still aren't married: Sexual exclusivity—exclusivity with respect to a specific kind of bodily union—is required. But what is it about sexual intercourse that makes it uniquely capable of creating bodily union? People's bodies can touch and interact in all sorts of ways, so why does only sexual union make bodies in any significant sense "one flesh"?

Our organs—our heart and stomach, for example—are parts of one body because they are coordinated, along with other

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george. Among supporters of the conjugal view, see, for example, ST. THOMAS AQUINAS, SUMMA THEOLOGICA Supp., Q. 44, Art. 1.

parts, for a common biological purpose of the whole: our biological life. It follows that for two individuals to unite organically, and thus bodily, their bodies must be coordinated for some biological purpose of the whole.

That sort of union is impossible in relation to functions such as digestion and circulation, for which the human individual is by nature sufficient. But individual adults are naturally incomplete with respect to one biological function: sexual reproduction. In coitus, but not in other forms of sexual contact, a man and a woman's bodies coordinate by way of their sexual organs for the common biological purpose of reproduction. They perform the first step of the complex reproductive process. Thus, their bodies become, in a strong sense, one—they are biologically united, and do not merely rub together—in coitus (and only in coitus), similarly to the way in which one's heart, lungs, and other organs form a unity: by coordinating for the biological good of the whole. In this case, the whole is made up of the man and woman as a couple, and the biological good of that whole is their reproduction.

Here is another way of looking at it. Union on any plane—bodily, mental, or whatever—involves mutual coordination on that plane, toward a good on that plane. When Einstein and Bohr discussed a physics problem, they coordinated intellectually for an intellectual good, truth. And the intellectual union they enjoyed was real, whether or not its ultimate target (in this case, a theoretical solution) was reached—assuming, as we safely can, that both Einstein and Bohr were honestly seeking truth and not merely pretending while engaging in deception or other acts which would make their apparent intellectual union only an illusion.

By extension, bodily union involves mutual coordination toward a bodily good—which is realized only through coitus. And this union occurs even when conception, the bodily good toward which sexual intercourse as a biological function is oriented, does not occur. In other words, organic bodily unity is achieved when a man and woman coordinate to perform an act of the kind that causes conception. This act is traditionally called the act of generation or the generative act;[15] if (and only

15. *See, e.g.*, THOMAS WALTER LAQUEUR, MAKING SEX, BODY AND GENDER FROM THE GREEKS TO FREUD 48 (1990).

if) it is a free and loving expression of the spouses' permanent and exclusive commitment, then it is also a marital act.

Because interpersonal unions are valuable in themselves, and not merely as means to other ends, a husband and wife's loving bodily union in coitus and the special kind of relationship to which it is integral are valuable whether or not conception results and even when conception is not sought. But two men or two women cannot achieve organic bodily union since there is no bodily good or function toward which their bodies can coordinate, reproduction being the only candidate.[16] This is a clear sense in which their union cannot be marital, if marital means comprehensive and comprehensive means, among other things, bodily.

2. *Special Link to Children*

Most people accept that marriage is also deeply—indeed, in an important sense, uniquely—oriented to having and rearing children. That is, it is the kind of relationship that by its nature is oriented to, and enriched by, the bearing and rearing of children. But how can this be true, and what does it tell us about the structure of marriage?

It is clear that merely committing to rear children together, or even actually doing so, is not enough to make a relationship a marriage—to make it the kind of relationship that is by its nature oriented to bearing and rearing children. If three monks agreed to care for an orphan, or if two elderly brothers began caring for their late sister's son, they would not thereby become spouses. It is also clear that having children is not necessary to being married; newlyweds do not become spouses only when their first child comes along. Anglo-American legal tradition has for centuries regarded coitus, and not the conception or birth of a child, as the event that consummates a marriage.[17] Furthermore, this tradition has never denied that childless marriages were true marriages.

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16. Pleasure cannot play this role for several reasons. The good must be truly common and for the couple as a whole, but pleasures (and, indeed, any psychological good) are private and benefit partners, if at all, only individually. The good must be bodily, but pleasures are aspects of experience. The good must be inherently valuable, but pleasures are not as such good in themselves—witness, for example, sadistic pleasures. For more on this philosophical point, see LEE & GEORGE, *supra* note 1, 95–115, 176–97.

17. The Oxford English Dictionary charts the usage of "consummation" as, among other definitions not relating to marriage, "[t]he completion of marriage by sexual intercourse." OXFORD ENGLISH DICTIONARY III, at 803 (2d ed. 1989). The

How, then, should we understand the special connection between marriage and children? We learn something about a relationship from the way it is sealed or embodied in certain activities. Most generically, ordinary friendships center on a union of minds and wills, by which each person comes to know and seek the other's good; thus, friendships are sealed in conversations and common pursuits. Similarly, scholarly relationships are sealed or embodied in joint inquiry, investigation, discovery, and dissemination; sports communities, in practices and games.

If there is some conceptual connection between children and marriage, therefore, we can expect a correlative connection between children and the way that marriages are sealed. That connection is obvious if the conjugal view of marriage is correct. Marriage is a comprehensive union of two sexually complementary persons who seal (consummate or complete) their relationship by the generative act—by the kind of activity that is by its nature fulfilled by the conception of a child. So marriage itself is oriented to and fulfilled[18] by the bearing, rearing, and education of children. The procreative-type *act* distinctively seals or completes a procreative-type *union*.

Again, this is not to say that the marriages of infertile couples are not true marriages. Consider this analogy: A baseball team has its characteristic structure largely because of its orientation to winning games; it involves developing and sharing one's athletic skills in the way best suited for honorably winning (among other things, with assiduous practice and good sportsmanship). But such development and sharing are possible and inherently valuable for teammates even when they lose their games.

Just so, marriage has its characteristic structure largely because of its orientation to procreation; it involves developing and sharing one's body and whole self in the way best suited for honorable parenthood—among other things, permanently and exclusively. But such development and sharing, including the

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earliest such usage recorded in law was the 1548 Act 2–3 Edw. VI, c. 23 § 2: "Sentence for Matrimony, commanding Solemnization, Cohabitation, Consummation and Tractation as becometh Man and Wife to have." *Id.* In more modern usage, "consummation of marriage" is still regarded in family law as "[t]he first post-marital act of sexual intercourse between a husband and wife." BLACK'S LAW DICTIONARY 359 (9th ed. 2009).

18. That is, made even richer as the kind of reality it is.

bodily union of the generative act, are possible and inherently valuable for spouses even when they do not conceive children.[19]

Therefore, people who can unite bodily can be spouses without children, just as people who can practice baseball can be teammates without victories on the field. Although marriage is a social practice that has its basic structure by nature whereas baseball is wholly conventional, the analogy highlights a crucial point: Infertile couples and winless baseball teams both meet the basic requirements for participating in the practice (conjugal union; practicing and playing the game) and retain their basic orientation to the fulfillment of that practice (bearing and rearing children; winning games), even if that fulfillment is never reached.

On the other hand, same-sex partnerships, whatever their moral status, cannot be marriages because they lack any essential orientation to children: They cannot be sealed by the generative act. Indeed, in the common law tradition, only coitus (not anal or oral sex even between legally wed spouses) has been recognized as consummating a marriage.[20]

Given the marital relationship's natural orientation to children, it is not surprising that, according to the best available sociological evidence, children fare best on virtually every indicator of wellbeing when reared by their wedded biological parents. Studies that control for other relevant factors, including poverty and even genetics, suggest that children reared in intact homes fare best on the following indices:[21]

> *Educational achievement*: literacy and graduation rates;
>
> *Emotional health*: rates of anxiety, depression, substance abuse, and suicide;
>
> *Familial and sexual development*: strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and rates of sexual abuse; and

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19. For more on this point, see *infra* Part I.D.

20. For more on the difference between infertile and same-sex couples, see *infra* Part I.D.

21. For the relevant studies, see *Ten Principles on Marriage and the Public Good*, signed by some seventy scholars, which corroborates the philosophical case for marriage with extensive evidence from the social sciences about the welfare of children and adults. THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 9–19 (2008), *available at* http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf.

> *Child and adult behavior*: rates of aggression, attention deficit disorder, delinquency, and incarceration.

Consider the conclusions of the left-leaning research institution Child Trends:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents. . . ."[I]t is not simply the presence of two parents, . . . but the presence of *two biological parents* that seems to support children's development.[22]

According to another study, "[t]he advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."[23] Recent literature reviews conducted by the Brookings Institution, the Woodrow Wilson School of Public and International Affairs at Princeton University, the Center for Law and Social Policy, and the Institute for American Values corroborate the importance of intact households for children.[24]

Note, moreover, that for a relationship to be oriented to children in this principled as well as empirically manifested way, sexual orientation as such is not a disqualifier. The union of a husband and wife bears this connection to children even if, say, the husband is also attracted to men. What is necessary in this respect is rather sexual complementarity. Two men, even if they are attracted only to women, cannot exhibit this kind of biological complementarity. In this sense, it is not individuals as such who are singled out—as being less capable of affection-

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22. Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS RESEARCH BRIEF, June 2002, at 1–2, 6, *available at* http://www.childtrends.org/files/MarriageRB602.pdf.

23. Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003).

24. *See* Sara McLanahan, Elisabeth Donahue & Ron Haskins, *Introducing the Issue*, 15 THE FUTURE OF CHILD. 3 (2005); Mary Parke, *Are Married Parents Really Better for Children?*, CLASP POLICY BRIEF, May 2003; W. BRADFORD WILCOX ET AL., 2 WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 6 (2005).

ate and responsible parenting, or anything else. Instead, what are systematically favored as bearing a special and valuable link to childrearing are certain arrangements and the acts that complete or embody them—to which, of course, particular individuals are more or less inclined.

3. Marital Norms

Finally, unions that are consummated by the generative act, and that are thus oriented to having and rearing children, can make better sense of the other norms that shape marriage as we have known it.

For if bodily union is essential to marriage,[25] we can understand why marriage is incomplete and can be dissolved if not consummated, and why it should be, like the union of organs into one healthy whole, total and lasting for the life of the parts ("till death do us part"[26]). That is, the comprehensiveness of the union across the dimensions of each spouse's being calls for a temporal comprehensiveness, too: through time (hence permanence) and at each time (hence exclusivity). This is clear also from the fact that the sort of bodily union integral to marriage grounds its special, essential link to procreation,[27] in light of which it is unsurprising that the norms of marriage should create conditions suitable for children: stable and harmonious conditions that sociology and common sense agree are undermined by divorce—which deprives children of an intact biological family—and by infidelity, which betrays and divides one's attention and responsibility to spouse and children, often with children from other couplings.

Thus, the inherent orientation of conjugal union to children deepens and extends whatever reasons spouses may have to stay together for life and to remain faithful: in relationships that lack this orientation, it is hard to see why permanence and exclusivity should be, not only desirable whenever not very costly (as stability is in *any* good human bond), but inherently normative for anyone in the relevant kind of relationship.[28]

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25. For more on this point see *supra* Part I.B.I.

26. BOOK OF COMMON PRAYER 220 (Oxford 1815).

27. For more on this point see *supra* Part I.B.I.

28. *See infra* Part I.E.3.

C. *How Would Gay Civil Marriage Affect You or Your Marriage?*

At this point, some revisionists abandon the philosophical project of attacking the conjugal conception of marriage and simply ask, "what's the harm?" Even if we are right, is implementing our view important enough to justify the emotional and other difficulties that some may experience as a result of being denied recognition of the sexual partnerships they have formed? Why should the state care about some abstract moral principle?

Revisionists often capture this point with a question: "How would gay marriage affect you or your marriage?"[29] It is worth noting, first, that this question could be turned back on revisionists who oppose legally recognizing, for example, polyamorous unions: How would doing so affect anyone else's marriage? If this kind of question is decisive against the conjugal view's constraints on which unions to recognize, it cuts equally against the revisionist's. In fact it undermines neither since, as even many revisionists implicitly agree, public institutions like civil marriage have wide and deep effects on our culture—which in turn affects others' lives and choices.

Thus, supporters of the conjugal view often respond to this challenge—rightly, we believe—that abolishing the conjugal conception of marriage would weaken the social institution of marriage, obscure the value of opposite-sex parenting as an ideal, and threaten moral and religious freedom. Here is a sketch of how.

1. *Weakening Marriage*

No one deliberates or acts in a vacuum. We all take cues (including cues as to what marriage is and what it requires of us) from cultural norms, which are shaped in part by the law. Indeed, revisionists themselves implicitly concede this point. Why else would they be dissatisfied with civil unions for same-sex couples? Like us, they understand that the state's favored conception of marriage matters because it affects society's understanding of that institution.

In redefining marriage, the law would teach that marriage is fundamentally about adults' emotional unions, not bodily un-

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29. *See, e.g.*, Editorial, *A Vermont Court Speaks*, BOSTON GLOBE, Dec. 22, 1999, at A22 ("[Gay marriage] no more undermine[s] traditional marriage than sailing undermines swimming.").

ion[30] or children,[31] with which marital norms are tightly intertwined.[32] Since emotions can be inconstant, viewing marriage essentially as an emotional union would tend to increase marital instability—and it would blur the distinct value of friendship, which is a union of hearts and minds.[33] Moreover, and more importantly, because there is no reason that primarily emotional unions any more than ordinary friendships in general should be permanent, exclusive, or limited to two,[34] these norms of marriage would make less and less sense. Less able to understand the rationale for these marital norms, people would feel less bound to live by them. And less able to understand the value of marriage itself as a certain kind of union, even apart from the value of its emotional satisfactions, people would increasingly fail to see the intrinsic reasons they have for marrying[35] or staying with a spouse absent consistently strong feeling.

In other words, a mistaken marriage policy tends to distort people's understanding of the kind of relationship that spouses are to form and sustain. And that likely erodes people's adherence to marital norms that are essential to the common good. As University of Calgary philosopher Elizabeth Brake, who supports legal recognition of relationships of any size, gender composition, and allocation of responsibilities, affirms, "marriage does not simply allow access to legal entitlements; it also allows partners to signal the importance of their relationship *and to invoke social pressures on commitment*."[36]

Of course, marriage policy could go bad—and already has—in many ways. Many of today's public opponents of the revisionist view—for example, Maggie Gallagher, David Blankenhorn, the U.S. Catholic bishops—also opposed other legal changes detrimental to the conjugal conception of marriage.[37] We are focusing

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30. *See supra* Part I.B.1.

31. *See supra* Part I.B.2.

32. *See supra* Part I.B.3.

33. *See infra* Part II.C.

34. *See infra* Parts I.E.2–3.

35. Stanley Kurtz, *The End of Marriage in Scandinavia*, THE WKLY. STANDARD, Jan. 23, 2004, at 26, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp.

36. Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 332 (2010) (emphasis added).

37. RICHARD DOERFLINGER, FAMILY POLICY IN THE UNITED STATES (1980), *available at* http://www.usccb.org/prolife/tdocs/FaithfulForLife.pdf; MAGGIE GALLAGHER, THE

here on the issue of same-sex unions, not because it alone matters, but because it is the focus of a live debate whose results have wide implications for reforms to strengthen our marriage culture. Yes, social and legal developments have already worn the ties that bind spouses to something beyond themselves and thus more securely to each other. But recognizing same-sex unions would mean cutting the last remaining threads. After all, underlying people's adherence to the marital norms already in decline are the deep (if implicit) connections in their minds between marriage, bodily union, and children. Enshrining the revisionist view would not just wear down but tear out this foundation, and with it any basis for reversing other recent trends and restoring the many social benefits of a healthy marriage culture.

Those benefits redound to children and spouses alike. Because children fare best on most indicators of health and wellbeing when reared by their wedded biological parents,[38] the further erosion of marital norms would adversely affect children, forcing the state to play a larger role in their health, education, and formation more generally.[39] As for the adults, those in the poorest and most vulnerable sectors of society would be hit the hardest.[40] But adults more generally would be harmed insofar as the weakening of social expectations supporting marriage would make it harder for them to abide by marital norms.

2. *Obscuring the Value of Opposite-Sex Parenting As an Ideal*

As we have seen in Part I.B, legally enshrining conjugal marriage socially reinforces the idea that the union of husband and wife is (as a rule and ideal) the most appropriate environment for the bearing and rearing of children—an ideal whose value

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ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE (1996); PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (David Popenoe et al. eds., 1996); THE BOOK OF MARRIAGE: THE WISEST ANSWERS TO THE TOUGHEST QUESTIONS (Dana Mack & David Blankenhorn eds. 2001); THE FATHERHOOD MOVEMENT: A CALL TO ACTION (Wade F. Horn et al. eds., 1999); UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, MARRIAGE AND FAMILY LIFE (1975), *available at* http://www.usccb.org/prolife/programs/rlp/Marriage&FamilyLife75.pdf; Maggie Gallagher & Barbara Dafoe Whitehead, *End No-Fault Divorce?*, 75 FIRST THINGS 24 (1997).

38. *See supra* Part I.B.2.

39. *See* THE WITHERSPOON INSTITUTE, *supra* note 21.

40. They are clearly the primary victims of the erosion that has already taken place. *See* W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT'L AFFAIRS 81, 88–93 (2009).

is strongly corroborated by the best available social science.[41] Note, moreover, that the need for adoption where the ideal is practically impossible is no argument for redefining civil marriage, a unified legal structure of incentives meant precisely to *reinforce* the ideal socially and practically—to minimize the need for alternative, case-by-case provisions.

If same-sex partnerships were recognized as marriages, however, that ideal would be abolished from our law: no civil institution would any longer reinforce the notion that children need both a mother and father; that men and women on average bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways.

In that case, to the extent that some continued to regard marriage as crucially linked to children, the message would be sent that a household of two women or two men is, as a rule, *just as appropriate* a context for childrearing, so that it does not matter (even as a rule) whether children are reared by both their mother and their father, or by a parent of each sex at all.

On the other hand, to the extent that the connection between marriage and parenting is obscured more generally, as we think it would be eventually,[42] *no* kind of arrangement would be proposed as an ideal.

But the currency of *either* view would significantly weaken the extent to which the social institution of marriage provided social pressures and incentives for husbands to remain with their wives and children. And to the extent that children were not reared by both parents, they would be prone to suffer in the ways identified by social science.[43]

3. *Threatening Moral and Religious Freedom*

Because the state's value-neutrality on this question (of the proper contours and norms of marriage) is impossible if there is to be any marriage law at all, abolishing the conjugal understanding of marriage would imply that committed same-sex and opposite-sex romantic unions are equivalently real marriages. The state would thus be forced to view conjugal-marriage supporters as

41. *See supra* Part I.B.2.
42. *See supra* Part I.C.1.
43. *See supra* Part I.B.2.

bigots who make groundless and invidious distinctions. In ways that have been catalogued by Marc Stern of the American Jewish Committee and by many other defenders of the rights of conscience, this would undermine religious freedom and the rights of parents to direct the education and upbringing of their children.[44]

Already, we have seen antidiscrimination laws wielded as weapons against those who cannot, in good conscience, accept the revisionist understanding of sexuality and marriage: In Massachusetts, Catholic Charities was forced to give up its adoption services rather than, against its principles, place children with same-sex couples.[45] In California, a U.S. District Court held that a student's religious speech against homosexual acts could be banned by his school as injurious remarks that "intrude[s] upon the work of the schools or on the rights of other students."[46] And again in Massachusetts, a Court of Appeals ruled that a public school may teach children that homosexual relations are morally good despite the objections of parents who disagree.[47]

The proposition that support for the conjugal conception of marriage is nothing more than a form of bigotry has become so deeply entrenched among marriage revisionists that a *Washington Post* feature story[48] drew denunciations and cries of journalistic bias for even implying that one conjugal-marriage advocate was "sane" and "thoughtful." Outraged readers compared the profile to a hypothetical puff piece on a Ku Klux Klan member.[49] A *New York Times* columnist has called proponents of conjugal marriage "bigots," even singling an author of this Article out by

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44. Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 11–14 (Douglas Laycock et al. eds., 2008). This collection of essays includes the views of scholars on both sides of the same-sex marriage question, who conclude that conflicts with religious liberty are inevitable where marriage is extended to same-sex couples.

45. Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, THE WKLY. STANDARD, May 5, 2006, at 20, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp.

46. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1122 (S.D. Cal. 2004).

47. *See, e.g.*, Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).

48. Monica Hesse, *Opposing Gay Unions With Sanity & a Smile*, WASH. POST., Aug. 28, 2009, at C01.

49. Andrew Alexander, *'Sanity & a Smile' and an Outpouring of Rage*, WASH. POST, Sept. 6, 2009, at A17.

name.[50] Meanwhile, organizations advocating the legal redefinition of marriage label themselves as being for "human rights" and against "hate."[51] The implications are clear: if marriage is legally redefined, believing what every human society once believed about marriage—namely, that it is a male-female union—will increasingly be regarded as evidence of moral insanity, malice, prejudice, injustice, and hatred.

These points are not offered as arguments for accepting the conjugal view of marriage. If our viewpoint is wrong, then the state could be justified in sometimes requiring others to treat same-sex and opposite-sex romantic unions alike, and private citizens could be justified in sometimes marginalizing the opposing view as noxious. Rather, given our arguments about what marriage actually is,[52] these are important warnings about the consequences of enshrining a seriously unsound conception of marriage. These considerations should motivate people who accept the conjugal view but have trouble seeing the effects of abolishing it from the law.

In short, marriage should command our attention and energy more than many other moral causes because so many dimensions of the common good are damaged if the moral truth about marriage is obscured. For the same reason, bypassing the current debate by abolishing marriage law entirely would be imprudent in the extreme. Almost no society that has left us a trace of itself has done without some regulation of sexual relationships. As we show in Part I.E.1 (and the data cited in Part I.B.2 suggest), the wellbeing of children gives us powerful prudential reasons to recognize and protect marriage legally.

D. If Not Same-Sex Couples, Why Infertile Ones?

Revisionists often challenge proponents of the conjugal view of marriage to offer a principled argument for recognizing the

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50. Frank Rich, Op-Ed., *The Bigots' Last Hurrah*, N.Y. TIMES, Apr. 19, 2009 (Week in Review), at 10.

51. *See, e.g.*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org (last visited Nov. 8, 2010) (self-identifying the organization as a 501(c)(4) advocacy group "working for lesbian, gay, bisexual, and transgender equal rights"); Annie Stockwell, *Stop the Hate: Vote No on 8*, ADVOCATE.COM (Aug. 20, 2008), http://www.advocate.com/Arts_and_Entertainment/People/Stop_the_Hate (framing opposition to California's Proposition Eight, which provides that "only marriage between a man and a woman is valid or recognized in California," as a struggle against hate).

52. *See supra* Part I.B.

unions of presumptively infertile couples that does not equally justify the recognition of same-sex partnerships. But this challenge is easily met.

1. Still Real Marriages

To form a real marriage, a couple needs to establish and live out the kind of union that would be completed by, and be apt for, procreation and child-rearing.[53] Since any true and honorable harmony between two people has value in itself (not merely as a means), each such comprehensive union of two people—each permanent, exclusive commitment sealed by organic bodily union—certainly does as well.

Any act of organic bodily union can seal a marriage, whether or not it causes conception.[54] The nature of the spouses' action now cannot depend on what happens hours later independently of their control—whether a sperm cell in fact penetrates an ovum. And because the union in question is an organic bodily union, it cannot depend for its reality on psychological factors. It does not matter, then, if spouses do not intend to have children or believe that they cannot. Whatever their thoughts or goals, whether a couple achieves bodily union depends on facts about what is happening between their bodies.[55]

It is clear that the bodies of an infertile couple can unite organically through coitus. Consider digestion, the individual body's process of nourishment. Different parts of that process—salivation, chewing, swallowing, stomach action, intestinal absorption of nutrients—are each in their own way oriented to the broader goal of nourishing the organism. But our salivation, chewing, swallowing, and stomach action remain oriented to that goal (and remain digestive acts) even if on some occasion our intestines do not or cannot finally absorb nutrients, and even if we know so before we eat.[56]

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53. *See supra* Parts I.B.1–3.

54. *See supra* Part I.B.1.

55. Whether bodily union is truly marital depends on other factors—for example, whether it is undertaken freely to express permanent and exclusive commitment. So bodily union is necessary but not sufficient for marital union.

56. Professor Andrew Koppelman has argued that "[a] sterile person's genitals are no more suitable for generation than an unloaded gun is suitable for shooting. If someone points a gun at me and pulls the trigger, he exhibits the behavior which, as behavior, is suitable for shooting, but it still matters a lot whether the

Similarly, the behavioral parts of the process of reproduction do not lose their dynamism toward reproduction if non-behavioral factors in the process—for example, low sperm count or ovarian problems—prevent conception from occurring, even if the spouses expect this beforehand. As we have argued,[57] bodies coordinating toward a single biological function for which each alone is not sufficient are rightly said to form an organic union.

Thus, infertility is no impediment to bodily union and therefore (as our law has always recognized) no impediment to marriage. This is because in truth marriage is not a mere means, even to the great good of procreation.[58] It is an end in itself, worthwhile for its own sake. So it can exist apart from children, and the state can recognize it in such cases without distorting the moral truth about marriage.

Of course, a true friendship of two men or two women is also valuable in itself. But lacking the capacity for organic bodily union, it cannot be valuable specifically *as a marriage*: it cannot be the comprehensive union[59] on which aptness for procreation[60] and distinctively marital norms[61] depend. That is why only a

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gun is loaded and whether he knows it." ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 87–88 (2002).

Professor Koppelman's objection is mistaken and misses an important point. Natural organs and organic processes are unlike man-made objects and artificial processes, which retain their dynamism toward certain goals only so long as we use them for those goals—which in turn presupposes that we think them capable of actually realizing those goals. That is, the function of man-made objects and processes is imposed on them by the human beings who use them. Thus, a piece of metal becomes a knife—an artifact whose function is to cut—only when we intend to use it for cutting. When it is no longer capable of cutting and we no longer intend to use it for cutting, it is no longer really a knife.

The same does not hold for the union between a man and a woman's human bodies, however, because natural organs are what they are (and thus have their natural dynamism toward certain functions) independently of what we intend to use them for and even of whether the function they serve can be brought to completion. Thus, in our example, a stomach remains a stomach—an organ whose natural function is to play a certain role in digestion—regardless of whether we intend it to be used that way and even of whether digestion will be successfully completed. Something analogous is true of sexual organs with respect to reproduction.

57. *See supra* Part I.B.1.

58. On the conjugal view, spouses pledge to form a union that is comprehensive and thus bodily, and thus procreative by nature. They do not and cannot pledge to form a union that results in procreation.

59. *See id.*

60. *See supra* Part I.B.2.

61. *See supra* Part I.B.3.

man and a woman can form a marriage—a union whose norms and obligations are decisively shaped by its essential dynamism toward children. For that dynamism comes not from the actual or expected presence of children, which some same-sex partners and even cohabiting brothers could have, and some opposite-sex couples lack, but from the way that marriage is sealed or consummated:[62] in coitus, which is organic bodily union.

2. *Still in the Public Interest*

Someone might grant the principled point that infertility is not an impediment to marriage, and still wonder what public benefit a marriage that cannot produce children would have. Why, in other words, should we legally recognize an infertile marriage?

Practically speaking, many couples believed to be infertile end up having children, who would be served by their parents' healthy marriage; and in any case, the effort to determine fertility would require unjust invasions of privacy. This is a concern presumably shared by revisionists, who would not, for example, require interviews for ascertaining partners' level of affection before granting them a marriage license.

More generally, even an obviously infertile couple—no less than childless newlyweds or parents of grown children—can live out the features and norms of real marriage and thereby contribute to a healthy marriage culture. They can set a good example for others and help to teach the next generation what marriage is and is not. And as we have argued[63] and will argue,[64] everyone benefits from a healthy marriage culture.

What is more, any marriage law at all communicates some message about what marriage is as a moral reality. The state has an obligation to get that message right, for the sake of people who might enter the institution, for their children, and for the community as a whole. To recognize only fertile marriages is to suggest that marriage is merely a means to procreation and childrearing—and not what it truly is, namely, a good in itself.[65] It may

62. *See supra* Part I.B.2.
63. *See supra* Part I.C.
64. *See infra* Part I.E.1.
65. *See supra* Parts I.B.1–2

also violate the principle of equality to which revisionists appeal,[66] because infertile and fertile couples alike can form unions of the same basic kind: real marriages. In the absence of strong reasons for it, this kind of differential treatment would be unfair.

Finally, although a legal scheme that honored the conjugal conception of marriage, as our law has long done, would not restrict the incidents of marriage to spouses who happen to have children, its success would tend to limit children to families led by legally married spouses. After all, the more effectively the law teaches the truth about marriage, the more likely people are to enter into marriage and abide by its norms. And the more people form marriages and respect marital norms, the more likely it is that children will be reared by their wedded biological parents. Death and tragedy make the gap impossible to close completely, but a healthier marriage culture would make it shrink. Thus, enshrining the moral truth of marriage in law is crucial for securing the great social benefits served by real marriage.

E. Challenges for Revisionists

Although the conjugal view is, despite its critics, not only inferable from certain widely accepted features of marriage and good for society, but also internally coherent, no version of the revisionists' view accounts for some of their own beliefs about marriage: namely, that the state has an interest in regulating some relationships, but only if they are romantic—presumptively sexual—and only if they are monogamous.

Though some unsatisfactory efforts have been made, revisionists are at a loss to give principled reasons for these positions.[67] Unless something like the conjugal understanding of marriage is correct, the first point becomes much harder to defend, and a principled defense of the second and third becomes impossible.

1. The State Has an Interest in Regulating Some Relationships?

Why does the state not set terms for our ordinary friendships? Why does it not create civil causes of action for neglecting or even betraying our friends? Why are there no civil ceremonies for forming friendships or legal obstacles to ending them? It is simply

66. *See supra* Part I.A.1.

67. Note that only sound arguments based on true *principles* can be inherently decisive.

because ordinary friendships do not affect the political common good in structured ways that justify or warrant legal regulation.

Marriages, in contrast, are a matter of urgent public interest, as the record of almost every culture attests—worth legally recognizing and regulating.[68] Societies rely on families, built on strong marriages, to produce what they need but cannot form on their own: upright, decent people who make for reasonably conscientious, law-abiding citizens. As they mature, children benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.[69]

Although some libertarians propose to "privatize" marriage,[70] treating marriages the way we treat baptisms and bar mitzvahs, supporters of limited government should recognize that marriage privatization would be a catastrophe for limited government.[71] In the absence of a flourishing marriage culture, families often fail to form, or to achieve and maintain stability. As absentee fathers and out-of-wedlock births become common, a train of social pathologies follows.[72] Naturally, the demand for governmental policing and social services grows. According to a Brookings Institute study, $229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture and the resulting exacerbation of social ills: teen pregnancy, poverty, crime, drug abuse, and health problems.[73] Sociologists David Popenoe and Alan Wolfe have conducted research on Scandinavian countries that supports the conclusion that as marriage culture declines, state spending rises.[74]

This is why the state has an interest in marriages that is deeper than any interest it could have in ordinary friendships: Marriages

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68. *See* Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 51–52 (2004).

69. *See supra* Part I.B.2.

70. *See, e.g.*, David Boaz, *Privatize Marriage: A Simple Soution to the Gay-Marriage Debate*, SLATE (Apr. 25, 1997), http://slate.com/id/2440/.

71. This is because, if the State failed to recognize the institution of marriage altogether, social costs would be imposed, in large part on children, due to the breakdown of traditional family structures which lend stability.

72. *See supra* Part I.B.2.

73. Isabel V. Sawhill, *Families at Risk*, *in* SETTING NATIONAL PRIORITIES: THE 2000 ELECTION AND BEYOND 97, 108 (Henry J. Aaron & Robert D. Reischauer eds., 1999); *see also* THE WITHERSPOON INSTITUTE, *supra* note 21, at 15.

74. DAVID POPENOE, DISTURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES, at xiv-xv (1988); ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 132–42 (1989).

bear a principled and practical connection to children.[75] Strengthening the marriage culture improves children's shot at becoming upright and productive members of society. In other words, our reasons for enshrining any conception of marriage, and our reasons for believing that the conjugal understanding of marriage is the correct one, are one and the same: the deep link between marriage and children. Sever that connection, and it becomes much harder to show why the state should take any interest in marriage at all. Any proposal for a policy, however, has to be able to account for why the state should enact it.

2. *Only if They Are Romantic?*

Some argue simply that the state should grant individuals certain legal benefits if they provide one another domestic support and care. But such a scheme would not be marriage, nor could it make sense of the other features of marriage law.

Take Joe and Jim. They live together, support each other, share domestic responsibilities, and have no dependents. Because Joe knows and trusts Jim more than anyone else, he would like Jim to be the one to visit him in the hospital if he is ill, give directives for his care if he is unconscious, inherit his assets if he dies first, and so on. The same goes for Jim.

So far, you may be assuming that Joe and Jim have a sexual relationship. But does it matter? What if they are bachelor brothers? What if they are best friends who never stopped rooming together after college, or who reunited after being widowed? Is there any reason that the benefits they receive should depend on whether their relationship is or even could be romantic? In fact, would it not be patently unjust if the state withheld benefits from them on the sole ground that they were *not* having sex?

Someone might object that everyone just knows that marriage has some connection to romance. It requires no explanation. But that is question-begging against Joe and Jim, who want their benefits. And it prematurely stops searching for an answer to why we tend to associate marriage with romance. The explanation brings us back to our central point: Romance is the kind of desire that aims at bodily union, and marriage has much to do with that.

Once this point is admitted, we return to the question of what counts as organic bodily union. Does hugging? Most

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75. *See supra* Part I.B.2.

think not. But then why is sex so important? What if someone derived more pleasure or felt intimacy from some other behavior (tennis, perhaps, as in our earlier example)? We must finally return to the fact that coitus, the generative act, uniquely unites human persons, as explained above.[76] But that fact supports the conjugal view: The reason that marriage typically involves romance is that it necessarily involves bodily union, and romance is the sort of desire that seeks bodily union. But organic bodily union is possible only between a man and a woman.

3. *Only if They Are Monogamous?*

Go back now to the example of Joe and Jim, and add a third man: John. To filter the second point out of this example, assume that the three men are in a romantic triad. Does anything change? If one dies, the other two are coheirs. If one is ill, either can visit or give directives. If Joe and Jim could have their romantic relationship recognized, why should not Joe, Jim, and John?

Again, someone might object, everyone just knows that marriage is between only two people. It requires no explanation. But this again begs the question against Joe, Jim, and John, who want their shared benefits and legal recognition. After all, it is not that each wants benefits as an individual; marriage is a union. They want recognition of their polyamorous relationship and the shared benefits that come with that recognition.

But if the conjugal conception of marriage is correct, it is clear why marriage is possible only between two people. Marriage is a comprehensive interpersonal union that is consummated and renewed by acts of organic bodily union[77] and oriented to the bearing and rearing of children.[78] Such a union can be achieved by two and only two because no single act can organically unite three or more people at the bodily level or, therefore, seal a comprehensive union of three or more lives at other levels. Indeed, the very comprehensiveness of the union requires the marital commitment to be undivided—made to exactly one other person; but such comprehensiveness, and the exclusivity that its orientation to children demands, makes sense only on

76. *See supra* Part I.B.1.
77. *See supra* Part I.B.1.
78. *See supra* Part I.B.2.

the conjugal view.[79] Children, likewise, can have only two parents—a biological mother and father. There are two sexes, one of each type being necessary for reproduction. So marriage, a reproductive type of community, requires two—one of each sex.

Some may object that this is a red herring—that no one is clamoring for recognition of polyamorous unions. Aren't we invoking an alarmist "slippery slope" argument?

It should be noted, to begin with, that there is nothing inherently wrong with arguing against a policy based on reasonable predictions of unwanted consequences. Such predictions would seem quite reasonable in this case, given that prominent figures like Gloria Steinem, Barbara Ehrenreich, and Cornel West have already demanded legal recognition of "multiple-partner" sexual relationships.[80] Nor are such relationships unheard of: *Newsweek* reports that there are more than 500,000 in the United States alone.[81]

Still, this Article does not aim to predict social or legal consequences of the revisionist view. The goal of examining the criteria of monogamy and romance (Part I.E.2) is to make a simple but crucial conceptual point: Any principle that would justify the legal recognition of same-sex relationships would also justify the legal recognition of polyamorous and non-sexual ones. So if, as most people—including many revisionists—believe, true marriage is essentially a sexual union of exactly two persons, the revisionist conception of marriage must be unsound. Any revisionist who agrees that the state is justified in recognizing only real marriages[82] must either reject traditional norms of monogamy and sexual consummation or adopt the conjugal view—which excludes same-sex unions.

University of Calgary's Professor Elizabeth Brake embraces this result and more. She supports "minimal marriage," in which "individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves deter-

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79. *See supra* Part I.B.3.

80. *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), http://beyondmarriage.org/full_statement.html.

81. Jessica Bennett, *Only You. And You. And You: Polyamory—relationships with multiple, mutually consenting partners—has a coming-out party*, NEWSWEEK (July 29, 2009), http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html.

82. *See supra* Part I.A.

mining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each."[83] But the more that the parties to a "minimal marriage" determine on a case-by-case basis which rights and duties to exchange—as they must if a greater variety of recognized unions is available—the less the proposed policy itself accomplishes. As we deprive marriage policy of definite shape, we deprive it of purpose. Rigorously pursued, the logic of rejecting the conjugal conception of marriage thus leads, by way of formlessness, toward pointlessness: It proposes a policy of which, having removed the principled ground for any restrictions, it can hardly explain the benefit. Of course, some revisionists will base their support for their preferred norms instead on contingent calculations of prudence or feasibility, which we address next. But we challenge the many revisionists who support norms, like monogamy, as a matter of moral principle to complete the following sentence: *Polyamorous unions and nonsexual unions by nature cannot be marriages, and should not be recognized legally, because . . .*

F. Isn't Marriage Just Whatever We Say It Is?

Of those who do base marriage policy on contingent calculations of prudence or feasibility, some are what we might call "constructivists."[84] They deny that there is any reality to marriage independent of custom—any set of objective conditions that a relationship must meet to ground the moral privileges and obligations distinctive of that natural kind of union which we have called real marriage.[85] For constructivists, rather, marriage is whatever social and legal conventions say that it is, there being no separate moral reality for these conventions to track. Hence it is impossible for the state's policy to be wrong about marriage: different proposals are only more or less feasible or preferable.[86]

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83. Brake, *supra* note 36, at 303.

84. *See, e.g.*, Eskridge, *supra* note 5, at 1421–22 ("A social constructivist history emphasizes the ways in which marriage is 'constructed' over time, the institution being viewed as reflecting larger social power relations.").

85. *See id.* at 1434 ("[M]arriage is not a naturally generated institution with certain essential elements. Instead it is a construction that is linked with other cultural and social institutions, so that the old-fashioned boundaries between the public and private life melt away.").

86. *See* Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (Saxe, J., dissenting) ("Civil marriage is an institution created by the state . . . ."); Andersen v. King Cnty., 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting)

This view is belied by the principled distinction between the whole spectrum of ordinary friendships on the one hand, and on the other hand those inherently valuable relationships that first, organically extend two people's union along the bodily dimension of their being; second, bear an intrinsic orientation to childbearing and rearing; and third, require a permanent and exclusive commitment. Marriage's independent reality is only confirmed by the fact that the known cultures of every time and place have seen fit to regulate the relationships of actual or would-be parents to each other and to any children that they might have.

Even if marriage did not have this independent reality, our other arguments against revisionists would weigh equally against constructivists who favor legally recognizing same-sex unions: They would have no grounds at all for arguing that our view infringes same-sex couples' natural and inviolable right to marriage, nor for denying recognition to unions apparently just as socially valuable as same-sex ones, for marriage would be a mere fiction designed to efficiently promote social utility. The needs of children would still give us very strong utility-based reasons to have a marriage policy in the first place.[87] And the social damage that we could expect from further eroding the conjugal view would more than justify preserving it in the law.[88] This justification would only be strengthened by the possibility of meeting other pragmatic goals in ways that do not threaten the common good as redefining marriage would.[89] So even constructivists about marriage could and should oppose legally recognizing same-sex partnerships.

II

A. Why Not Spread Traditional Norms to the Gay Community?

Abstract principles aside, would redefining marriage have the positive effect of reinforcing traditional norms by increasing the number of stable, monogamous, faithful sexual unions to include many more same-sex couples? There are good reasons to think not.

("[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State.").

87. *See supra* Part I.B.2.

88. *See supra* Parts I.C, I.D.2.

89. *See supra* Part II.B.

First, although the principles outlined above are abstract, they are not for that reason disconnected from reality. People will tend to abide less strictly by any given norms the less those norms make sense. And if marriage is understood as revisionists understand it—that is, as an essentially emotional union that has no principled connection to organic bodily union and the bearing and rearing of children—then marital norms, especially the norms of permanence, monogamy, and fidelity, will make less sense. In other words, those making this objection are right to suppose that redefining marriage would produce a convergence—but it would be a convergence in exactly the wrong direction. Rather than imposing traditional norms on homosexual relationships, abolishing the conjugal conception of marriage would tend to erode the basis for those norms in *any* relationship. Public institutions shape our ideas, and ideas have consequences; so removing the rational basis for a norm will erode adherence to that norm—if not immediately, then over time.

This is not a purely abstract matter. If our conception of marriage were right, what would you expect the sociology of same-sex romantic unions to be like? In the absence of strong reasons to abide by marital norms in relationships radically dissimilar to marriages, you would expect to see less regard for those norms in both practice and theory. And on both counts, you would be right.

Consider the norm of monogamy. Judith Stacey—a prominent New York University professor who testified before Congress against the Defense of Marriage Act and is in no way regarded by her academic colleagues as a fringe figure—expressed hope that the triumph of the revisionist view would give marriage "varied, creative, and adaptive contours . . . [leading some to] question the dyadic limitations of Western marriage and seek . . . small group marriages."[90] In their statement "Beyond Same-Sex Marriage," more than 300 "LGBT and allied" scholars and advocates—including prominent Ivy League professors—call for legal recognition of sexual relationships involving more than two partners.[91] Professor Brake thinks that we are obligated in justice to use such legal recognition to "denormalize[] heterosexual monogamy as a

90. *See* Gallagher, *supra* note 68, at 62.

91. *Beyond Same-Sex Marriage*, *supra* note 80.

way of life" for the sake of "rectifying past discrimination against homosexuals, bisexuals, polygamists, and care networks."[92]

What about the connection to children? Andrew Sullivan says that marriage has become "primarily a way in which two adults affirm their emotional commitment to one another."[93] E.J. Graff celebrates the fact that recognizing same-sex unions would make marriage "ever after stand for sexual choice, for cutting the link between sex and diapers."[94]

And exclusivity? Mr. Sullivan, who extols the "spirituality" of "anonymous sex," also thinks that the "openness" of same-sex unions could enhance the relationships of husbands and wives:

> Same-sex unions often incorporate the virtues of friendship more effectively than traditional marriages; and at times, among gay male relationships, the openness of the contract makes it more likely to survive than many heterosexual bonds. . . . [T]here is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman. . . . [S]omething of the gay relationship's necessary honesty, its flexibility, and its equality could undoubtedly help strengthen and inform many heterosexual bonds.[95]

Of course, "openness" and "flexibility" here are Sullivan's euphemisms for sexual infidelity.

Indeed, some revisionists have positively embraced the goal of weakening the institution of marriage. "[Former President George W.] Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage."[96] Victoria Brownworth is no right-wing traditionalist, but an advocate of legally recognizing gay partnerships. She continues: "It most certainly will do so, and that will make marriage a far better concept than it previously has been."[97] Professor Ellen

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92. Brake, *supra* note 36, at 336, 323.

93. Andrew Sullivan, *Introduction*, *in* SAME-SEX MARRIAGE: PRO AND CON: A READER, at xvii, xix (Andrew Sullivan ed., 1st ed. 1997).

94. E.J. GRAFF, *Retying the Knot*, *in* SAME-SEX MARRIAGE: PRO AND CON, *supra* note 93, at 134, 136.

95. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 202–03 (1996).

96. Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, *in* I DO/I DON'T: QUEERS ON MARRIAGE 53, 58–59 (Greg Wharton & Ian Philips eds., 2004).

97. *Id.* at 59.

Willis, another revisionist, celebrates that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart."[98]

Michelangelo Signorile, a prominent gay activist, urges same-sex couples to "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution."[99] Same-sex couples should "fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely[, because t]he most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely."[100]

Some revisionist advocates, like Jonathan Rauch, sincerely hope to preserve traditional marriage norms.[101] But it is not puzzling that he is severely outnumbered: other revisionists are right to think that these norms would be undermined by redefining marriage.

Preliminary social science backs this up. In the 1980s, Professors David McWhirter and Andrew Mattison, themselves in a romantic relationship, set out to disprove popular beliefs about gay partners' lack of adherence to sexual exclusivity. Of 156 gay couples that they surveyed, whose relationships had lasted from one to thirty-seven years, more than sixty percent had entered the relationship expecting sexual exclusivity, but not one couple stayed sexually exclusive longer than five years.[102] Professors McWhirter and Mattison concluded: "The expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals."[103] Far from disproving popular beliefs, they confirmed them.

On the question of numbers of partners, it is important to avoid stereotypes, which typically exaggerate unfairly, but also to consider the social data in light of what is suggested in this Article about the strength, or relative weakness, of the rational *basis* for permanence and exclusivity in various kinds of relationships. A

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98. Ellen Willis, *Can Marriage Be Saved? A Forum*, THE NATION, July 5, 2004, at 16, 16.

99. Michelangelo Signorile, *Bridal Wave*, OUT, Dec.–Jan. 1994, at 68, 161.

100. *Id.*

101. *See generally* JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2005).

102. DAVID P. MCWHIRTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252–53 (1984).

103. *Id.* at 3.

1990s U.K. survey of more than 5,000 men found that the median numbers of partners for men with exclusively heterosexual, bisexual, and exclusively homosexual inclinations over the previous five years were two, seven, and ten, respectively.[104] A U.S. survey found that the average number of sexual partners since the age of eighteen for men who identified as homosexual or bisexual was over 2.5 times as many as the average for heterosexual men.[105]

So there is no reason to believe, and abundant reason to doubt, that redefining marriage would make people more likely to abide by its norms. Instead, it would undermine people's grasp of the intelligible basis for those norms in the first place. Nothing more than a Maginot line of sentiment would be left to support belief in sexual fidelity and hold back the change of attitudes and mores that a rising tide of revisionists approvingly expect same-sex marriage to produce.

Nor is legal regulation the answer; the state cannot effectively encourage adherence to norms in relationships where those norms have no deep rational basis. Laws that restrict people's freedom for no rational purpose are not likely to last, much less to have significant success in changing people's behavior by adherence. On the other hand, traditional marriage laws merely encourage adherence to norms in relationships where those norms already have an independent rational basis.[106] Preliminary evidence suggests that same-sex couples in jurisdictions that legally recognize their unions tend to be sexually "open" by design. The *New York Times* reported on a San Francisco State University study: "[G]ay nuptials are portrayed by opponents as an effort to rewrite the traditional rules of matrimony. Quietly, outside of the news media and courtroom spotlight, many gay couples are doing just that . . . ."[107] The argument from conservatism is very weak indeed.

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104. C.H. Mercer et al., *Behaviourally bisexual men as a bridge population for HIV and sexually transmitted infections? Evidence from a national probability survey*, 20 INT'L J. STD & AIDS 87, 88 (2009).

105. EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 314–16 (1994).

106. *See supra* Part I.B.3.

107. Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES, Jan. 29, 2010, at A17, *available at* http://www.nytimes.com/2010/01/29/us/29sfmetro.html?ref=us.

B. What About Partners' Concrete Needs?

Andrew Sullivan questions one of the authors of this Article:

> It also seems to me to be important to ask George what he proposes should be available to gay couples. Does he believe that we should be able to leave property to one another without other family members trumping us? That we should be allowed to visit one another in hospital? That we should be treated as next-of-kin in medical or legal or custody or property tangles? Or granted the same tax status as straight married couples? These details matter to real people living actual lives, real people the GOP seems totally uninterested in addressing.[108]

First, the benefits cited have nothing to do with whether the relationship is or could legally be romantic or sexual. But treating essentially similar cases as if they were radically different would be unfair. So these benefits would need to be available to all types of cohabitation if they were made available to any.[109] If the law grants them to a cohabiting male couple in a sexual partnership, surely it should grant them, say, to two interdependent brothers who also share domestic responsibilities and have similar needs. The two brothers' relationship would differ in many ways from that of two male sexual partners, but not in ways that affect whether it makes sense to grant them domestic benefits.

But a scheme that granted legal benefits to any two adults upon request—for example, romantic partners, widowed sisters, or cohabiting celibate monks—would not be a marriage scheme. It would not grant legal benefits on the presumption that the benefitted relationship is sexual. So we have no objection to this policy in principle. It would not in itself obscure the nature and norms of marriage.

Still, there are questions to answer before such sexually-neutral benefits packages are granted. What common good would be served by regulating or so benefitting what are essentially ordinary friendships? Why would that good be served only by relationships limited to two people? Can three cohabiting celibate monks not do as much good for each other or society as two? And whatever common good is at stake, does it really depend on, and

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108. Andrew Sullivan, *Only the Right Kind of Symbolic Sex*, THE DAILY DISH (Aug. 4, 2009, 11:11 AM), http://andrewsullivan.theatlantic.com/the_daily_dish/2009/08/only-the-right-kind-of-symbolic-sex.html.

109. *See supra* Part I.E.1.

justify, limiting people's freedom to form and dissolve such friendships, as legal regulation would inevitably do? Does it justify diluting the special social status of real marriages, as generic schemes of benefits would inevitably do?

The value of such a policy—at least for individuals who share the responsibilities of living together—seems to lie in its benefits to the individuals themselves, like hospital-visitation and inheritance rights. But these could be secured just as well by distinct legal arrangements (like power of attorney), which we think that anyone should be free to make with anyone else. Why create a special legal package for generic partnerships? There may be an argument for this in some jurisdictions where, for example, people would otherwise lack the education or resources to make their own legal arrangements. But if such a scheme is not susceptible to the powerful (and, we think, decisive) objections that apply to legal redefinitions of marriage, that is because it is not a redefinition of marriage at all.

C. *Doesn't the Conjugal Conception of Marriage Sacrifice Some People's Fulfillment for Others'?*

Some might be unmoved by our arguments because, as they see it, we treat homosexually oriented people as if they were invisible, leaving them no real opportunity for fulfillment. After all, they might say, human beings need meaningful companionship, which involves sex and public recognition. This objection is rooted in a misunderstanding not only of the nature of marriage, but also of the value of deep friendship.

Our view about marriage, like most people's views about any moral or political issue, is motivated precisely by our concern for the good of all individuals and communities—that is, for the common good. We have offered reasons for thinking that this good is served, not harmed, by traditional marriage laws; and harmed, not served, by abolishing them in favor of the revisionist understanding.

But to see a few of the problems with this objection, consider some of its hidden assumptions:

> *First*: Fulfillment is impossible without regular outlets for sexual release.
>
> *Second*: Meaningful intimacy is impossible without sex.
>
> *Third*: Fulfilling relationships are impossible without legal recognition.

> *Fourth*: Homosexual orientation is a basic human identity, such that any state that doesn't actively accommodate it necessarily harms or disregards a class of human beings.

Some of these assumptions are radically new in the history of ideas, and themselves depend on further significant, often uncritically accepted assumptions. More to the point, though, all four are either dubious or irrelevant to this debate.

Because bodies are integral parts of the personal reality of human beings,[110] only coitus can truly unite persons organically and, thus, maritally.[111] Hence, although the state can grant members of any household certain legal incidents, and should not prevent any from making certain private legal arrangements,[112] it cannot give same-sex unions what is truly distinctive of marriage—i.e., it cannot make them actually comprehensive, oriented by nature to children, or bound by the moral norms specific to marriage.[113] At most the state can call such unions marital, but this would not—because, in moral truth, it cannot—make them so; and it would, to society's detriment, obscure people's understanding about what truly marital unions do involve. In this sense, it is not the state that keeps marriage from certain people, but their circumstances that unfortunately keep certain people from marriage (or at least make marrying much harder). This is so, not only for those with exclusively homosexual attractions, but also for people who cannot marry because of, for example, prior and pressing family obligations incompatible with marriage's comprehensiveness and orientation to children, inability to find a mate, or any other cause. Those who face such difficulties should in no way be marginalized or otherwise mistreated, and they deserve our support in the face of what are often considerable burdens. But none of this establishes the first mistaken assumption, that fulfillment is impossible without regular outlets for sexual release—an idea that devalues many people's way of life. What we wish for people unable to marry because of a lack of any attraction to a member of the opposite sex is the same as what we wish for people who can-

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110. *See supra* Part I.B.1.

111. Again, we do not think all acts of coitus even within marriages are marital. Unloving coitus between spouses, especially where it is based on coercion or manipulation, is not truly marital—it fails to embody and express true (comprehensive) spousal communion.

112. *See supra* Part II.B.

113. *See supra* Parts I.B.1–3.

not marry for any other reason: rich and fulfilling lives. In the splendor of human variety, these can take infinitely many forms. In any of them, energy that would otherwise go into marriage is channeled toward ennobling endeavors: deeper devotion to family or nation, service, adventure, art, or a thousand other things.

But most relevantly, this energy could be harnessed for deep friendship.[114] Belief in the second hidden assumption, that meaningful intimacy is not possible without sex, may impoverish the friendships in which single people could find fulfillment—by making emotional, psychological, and dispositional intimacy seem inappropriate in nonsexual friendships. We must not conflate depth of friendship with the presence of sex. Doing so may stymie the connection between friends who feel that they must distance themselves from the possibility or appearance of a sexual relationship where none is wanted.[115] By encouraging the myth that there can be no intimacy without romance, we deny people the wonder of knowing another as what Aristotle so aptly called a second self.[116]

The third assumption is baffling (but not rare) to find in this context. Even granting the second point, legal recognition has nothing to do with whether homosexual acts should be banned or whether anyone should be prevented from living with anyone else. This debate is not about anyone's private behavior. Instead, public recognition of certain relationships and the social effects of such recognition are at stake. Some have described the push for gay marriage as an effort to legalize or even to decriminalize such unions. But you can only de-criminalize or legalize what has been banned, and these unions are not banned. (By contrast, bigamy really is banned; it is a crime.) Rather, same-sex unions are simply not recognized as marriages or granted the benefits that we predicate on marriage. Indeed, recognizing

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114. Many same-sex attracted people who do not support legally recognizing same-sex unions have explored the special value for themselves of deep friendships. *See, e.g.*, John Heard, *Dreadtalk: 'Holy Sex & Christian Friendship' John Heard-Life Week 2009 At The University of Sydney-Remarks*, DREADNOUGHTS (May 4, 2009, 3:33 PM), http://johnheard.blogspot.com/2009/02/dreadtalk-holy-sex-christian-friendship.html.

115. For more on the effects of a sexualized culture on friendship, see Anthony Esolen, *A Requiem for Friendship: Why Boys Will Not Be Boys & Other Consequences of the Sexual Revolution*, 18 TOUCHSTONE MAGAZINE, Sept. 2005, at 21, *available at* http://www.touchstonemag.com/archives/article.php?id=18-07-021-f.

116. *See* ARISTOTLE, NICOMACHEAN ETHICS 260 (Terrence Irwin trans., Hackett Pub. Co. 1985).

same-sex unions would limit freedom in an important sense: it would require everyone else to treat such unions as if they were marriages, which citizens and private institutions are free to do or not under traditional marriage laws.

The fourth assumption draws an arbitrary distinction between homosexual and other sexual desires that do not call for the state's specific attention and sanction. It often leads people to suppose that traditional morality unfairly singles out people who experience same-sex attractions. Far from it. In everyone, traditional morality sees foremost a person of dignity whose welfare makes demands on every other being that can hear and answer them. In everyone, it sees some desires that cannot be integrated with the comprehensive union of marriage. In everyone, it sees the radical freedom to make choices that transcend those inclinations, heredity, and hormones; enabling men and women to become authors of their own character.

D. Isn't It Only Natural?

The discussion in the last section of whether homosexual orientation is a basic human identity relates to another objection, the answer to which may be inferred from the structure of arguments until this point. Some people on both sides of this debate are concerned with whether same-sex attractions are innate—and therefore, some theists conclude, intended by God—or merely a result of outside factors.[117] If homosexual desire is innate, they suppose, then same-sex unions should be legally recognized. After all, how could anything natural or intended by God be an impediment to a good such as marriage?

We do not pretend to know the genesis of same-sex attraction, but we consider it ultimately irrelevant to this debate. On this point, we agree with same-sex marriage advocate Professor John Corvino:

> The fact is that there are plenty of genetically influenced traits that are nevertheless undesirable. Alcoholism may have a genetic basis, but it doesn't follow that alcoholics ought to drink excessively. Some people may have a genetic predisposition to violence, but they have no more right to attack their neighbors than anyone else. Persons with such

117. Phyllis Zagano, *Nature vs. Nurture*, NATIONAL CATHOLIC REPORTER (Sept. 30, 2010), http://ncronline.org/blogs/just-catholic/nature-vs-nurture.

> tendencies cannot say "God made me this way" as an excuse for acting on their dispositions.[118]

Neither we nor Professor Corvino mean to equate same-sex attraction with diseases like alcoholism or injustices like violence against one's neighbor. The point is simply that whether same-sex unions can be marriages has nothing to do with what causes homosexual desire. Surely the fact that something is natural in the sense that it isn't caused by human choice proves nothing: Disabilities or pressing special obligations can be natural in that sense, and yet they may prevent some people from getting married.

Similarly, if we discovered (plausibly) a genetic basis for male desire for multiple partners, that would not be an argument for polygamy; and if we discovered (implausibly) that no sexual desire had a genetic basis, that would not be an argument against marriage in general. There is simply no logical connection between the origin of same-sex desire and the possibility of same-sex marriage.

E. Doesn't Traditional Marriage Law Impose Controversial Moral and Religious Views on Everyone?

This objection comes at the end for a reason. By now, as promised in the introduction, this Article has made a case for enshrining the conjugal view of marriage and addressed many theoretical and practical objections to it, without appeals to revelation or religious authority of any type. This reflects a crucial difference between marriage and matters of purely religious belief and practice, such as the doctrines of the Trinity and Incarnation, the enlightenment of the Buddha, baptisms, bar mitzvahs, and rules concerning ritual purification, fasting and prayer. Unlike these matters, the human good of marriage, and its implications for the common good of human communities, can be understood, analyzed, and discussed without engaging specifically theological issues and debates.

Of course, many religions do have ceremonies for recognizing marriages and teach the conjugal view of marriage (or

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118. John Corvino, *Nature? Nurture? It Doesn't Matter*, INDEPENDENT GAY FORUM (Aug. 12, 2004), http://igfculturewatch.com/2004/08/12/nature-nurture-it-doesnt-matter/. Professor Corvino's piece deals specifically with the morality of same-sex relations, which is not our topic here. But the same points apply.

something much closer to it than to the revisionist view). And many people are motivated to support the conjugal view for reasons that include religious ones. But none of these facts settles the debate about which view of marriage should be embodied in public policy. After all, some religions today teach, and motivate people's advocacy of, the revisionist view. Thus, religious motivations must disqualify both the conjugal and the revisionist views from policy debates, or neither.

Even so, some would say, enshrining the conjugal view of marriage involves privileging a controversial moral belief. Again, such an argument would equally exclude the revisionist view. Both would involve claims about which types of relationship we should publicly honor and encourage—and, by implication, which we should not. The revisionist view, at least in the version described above, would honor and privilege monogamous same-sex unions but not, for example, polyamorous ones. As we have pointed out,[119] our law will teach one lesson or another about what kinds of relationship are to be encouraged, unless we abolish marriage law, which we have strong reasons not to do.[120] In this sense, there is no truly neutral marriage policy.

Finally, it is important to realize that there is nothing special in these respects about marriage. Many other important policy issues can be resolved only by taking controversial moral positions, including ones on which religions have different teachings: for example, immigration, poverty relief, capital punishment, and torture. That does not mean that the state cannot, or should not, take a position on these issues. It does mean that citizens owe it to one another to explain with candor and clarity the reasons for their positions, as we have tried to do here.

CONCLUSION

A thought experiment might crystallize our central argument. Almost every culture in every time and place has had some institution that resembles what we know as marriage. But imagine that human beings reproduced asexually and that human offspring were self-sufficient. In that case, would *any* culture have

119. *See supra* Part I.D.2.

120. *See supra* Parts I.B.2, I.E.2.

developed an institution anything like what we know as marriage? It seems clear that the answer is no.

And our view explains why not. If human beings reproduced asexually, then organic bodily union—and thus comprehensive interpersonal union—would be impossible, no kind of union would have any special relationship to bearing and rearing children, and the norms that these two realities require would be at best optional features of any relationship. Thus, the essential features of marriage would be missing; there would be no human need that only marriage could fill.

The insight that pair bonds make little sense, and uniquely answer to no human need, apart from reproductive-type union merely underscores the conclusions for which we have argued: Marriage is the kind of union that is shaped by its comprehensiveness and fulfilled by procreation and child-rearing. Only this can account for its essential features, which make less sense in other relationships. Because marriage uniquely meets essential needs in such a structured way, it should be regulated for the common good, which can be understood apart from specifically religious arguments. And the needs of those who cannot prudently or do not marry (even due to naturally occurring factors), and whose relationships are thus justifiably regarded as different in kind, can be met in other ways.

So the view laid out in this Article is not simply the most favorable or least damaging trade-off between the good of a few adults, and that of children and other adults. Nor are there "mere arguments" on the one hand squaring off against people's "concrete needs" on the other. We reject both of these dichotomies. Marriage understood as the conjugal union of husband and wife really serves the good of children, the good of spouses, and the common good of society. And when the arguments against this view fail, the arguments for it succeed, and the arguments against its alternative are decisive, we take this as evidence that it serves the common good. For reason is not just a debater's tool for idly refracting arguments into premises, but a lens for bringing into focus the features of human flourishing.

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IS DOMA DEFENSIBLE? A SURVEY OF AMERICAN COURTS ON THE DEFINITION OF MARRIAGE

By William C. Duncan, Legal Analyst

INTRODUCTION

On April 22, 2011, a commentator writing on the Los Angeles Times' website claimed that "DOMA forces the federal government to discriminate against same-sex married couples and to treat their families as unworthy of protection or respect. A law that serves only to designate some families as second-class citizens has no principled defense."[1] Much the same view was expressed by Attorney General Eric Holder in announcing the Obama administration's refusal to defend the Defense of Marriage Act in federal litigation, and similar claims are being made by the Human Rights Campaign and others in an effort to intimidate a law firm whose partner, former Solicitor General Paul Clement, agreed to defend the federal Defense of Marriage Act (DOMA).

Is DOMA defensible? Are there reasonable justifications for the law adopted by Congress in 1996 that would continue to support its validity today?

The manifest weight of evidence, upon reviewing state and federal caselaw involving DOMA's constitutionality, suggests that DOMA is very defensible, and has been upheld by the great majority of American courts. In this brief, we find that (1) the majority of courts to consider DOMA's constitutionality have ruled that it is consistent with the U.S. Constitution, (2) an earlier immigration ruling on the constitutionality of the federal definition of marriage as the union of a husband and wife held that definition constitutional, (3) most state high courts to consider the question of whether the definition of marriage in DOMA is constitutional under state constitutions have held in favor of the marriage definition, (4) and the U.S. Supreme Court has ruled that the male-female definition of marriage is constitutional.

CASES UPHOLDING DOMA

Three cases have held that DOMA is constitutional:

- *Smelt v. Orange County*, 374 F. Supp. 2d 861, 880 (D. Cent. Ca. 2005) reversed on standing grounds by *Smelt v. Orange County*, 447 F.3d 673 (9th Cir. 2006) (plaintiffs did not have standing to challenge interstate recognition section of DOMA because they were not married but could challenge the marriage definition and the court decided DOMA's marriage definition was constitutional because it did not involve sex discrimination or a fundamental right and had a rational basis) "The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be

[1] Maya Rupert, "Nothing Defensible About DOMA" *Opinion L.A.* (April 22, 2011) at http://opinion.latimes.com/opinionla/2011/04/blowback-nothing-defensible-about-doma.html?cid=6a00d8341c7de353ef014e8806f111970d.

viewed as the optimal union for procreating and rearing children by both biological parents. Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government. The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence. By excluding same-sex couples from the federal rights and responsibilities of marriage, and by providing those rights and responsibilities only to people in opposite-sex marriages, the government is communicating to citizens that opposite-sex relationships have special significance. Congress could plausibly have believed sending this message makes it more likely people will enter into opposite-sex unions, and encourages those relationships."

- *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (U.S. Dist., M. D. Fla. 2005) (applying rational basis standard because same-sex marriage not a fundamental right) "Although this Court does not express an opinion on the validity of the government's proffered legitimate interests, it is bound by the Eleventh Circuit's holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest. See Lofton, 358 F.3d at 819-20. DOMA is rationally related to this interest."

- *In re Kandu*, 315 B.R. 123, 132 & 146 (Bankr. W.D. Wash. 2004) (bankruptcy decision rejecting Fourth, Fifth and Tenth Amendment challenges to DOMA) "The Tenth Amendment is not implicated because the definition of marriage in DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty. States retain the power to decide for themselves the proper definition of the term marriage." ** "Authority exists that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern. See, e.g., Bowen v. Gilliard, 483 U.S. 587, 614 (1987) (Brennan J., dissenting) (noting that "'the optimal situation for the child is to have both an involved mother and an involved father"') (quoting H. Biller, Paternal Deprivation 10 (1947)); Lofton v. Secretary of the Dep't of Children and Family Serv., 358 F.3d 804, 819 (11th Cir. 2004) (considering the state's argument that the presence of both male and female authority figures in the home is critical to optimal childhood development, the court held that "it is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society"); Adams, 486 F. Supp. At 1124 (holding that it is beyond dispute that the state has a compelling interest in providing "status and stability to the environment in which children are raised"); Standhard, 77 P.3d at 462-463 (holding that the state has an interest in promoting child-rearing by opposite-sex couples); Singer, 522 P.2d at 1197 (holding that "marriage is so clearly

> related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman"). This Court's personal view that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the Court's ultimate decision. It is within the province of Congress, not the courts, to weigh the evidence and legislate on such issues, unless it can be established that the legislation is not rationally related to a legitimate governmental end. Thus, although this Court may not personally agree with the positions asserted by the UST in support of DOMA, applying the rational basis test as set forth by the Supreme Court, this Court cannot say that DOMA's limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government's interest."

By contrast, one court has held DOMA unconstitutional. *Commonwealth v. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010) (definition of marriage section of DOMA violates the 10th Amendment); *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass., 2010) (definition of marriage section of DOMA violates the 5th Amendment). The court's decisions are pending on appeal in the U.S. Court of Appeals for the First Circuit.

PRECEDENT ON MALE-FEMALE *FEDERAL* DEFINITION OF MARRRIAGE

A case from the 1980s challenging the federal definition of marriage as the union of a man and a woman in immigration law (predating DOMA) similarly upheld that definition. The case is Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980) and it included the following relevant passages:

- "For immigration purposes, whether one is married to another, or is the spouse of another, is governed by congressional intent. It is the congressional intent that one look to the law of the jurisdiction where the marriage was contracted to determine its validity. But that is not an absolute and totally governing criterion. If the state law (or in certain instances the foreign law) is one which offends federal public policy, Congress is deemed to have intended federal public policy to prevail." page 1122

- "In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals. There is no real alternative to some overbreadth in achieving this goal. The state has chosen to allow legal marriage as between all couples of opposite sex. The alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family. Such tests and inquiries would themselves raise serious constitutional questions. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). Thus, it seems to me that the state has chosen the least intrusive alternative available to protect the procreative relationship." pages 1124-1125

On appeal, the Ninth Circuit also upheld the law in Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982):

"We hold that Congress's decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements. . . . In effect, Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores." 1042-1043

STATE COURTS UPHOLDING THE MARRIAGE DEFINITION OF DOMA

DOMA defines marriage as the union of a man and a woman. The same definition in state law has been challenges in a number of instances. One federal appeals court has upheld the definition on federal grounds and the high courts of New York, Maryland and Washington have also upheld the definition on state constitutional grounds:

- *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) "The State argues that the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.' By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws 'encourage procreation to take place within the socially recognized unit that is best situated for raising children.' The State and its supporting amici cite a host of judicial decisions and secondary authorities recognizing and upholding this rationale. The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a 'responsible procreation' theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot. See Hernandez v. Robles, No. 86, 2006 NY Slip Op 5239 at 5-6 (N.Y. Ct. App. Jul. 6, 2006); Morrison v. Sadler, 821 N.E.2d 15, 24-26 (Ind. Ct. App. 2005). Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.' Romer, 517 U.S. at 632."
- *Hernandez v. Robles*, 7 N.Y.3d 338, 359-360 (NY 2006) "the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement-in the form of marriage and its attendant benefits-to opposite-sex couples who

make a solemn, long-term commitment to each other. . . . The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold."

- *Deane v. Conaway*, 401 Md. 219, 932 A.2d 571, 630-631 (Md. 2007) "safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest. The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. . . . This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding)."
- *Andersen v. King County*, 158 Wash. 2d 1, 138 P.3d 963, 1002 (Wash. 2006) (J.M. Johnson., J. concurring) "A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State. Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise."

U.S. SUPREME COURT PRECEDENT UPHOLDING HUSBAND-WIFE DEFINITION OF MARRIAGE

In 1973, the U.S. Supreme Court dismissed a federal constitutional challenge to Minnesota's definition of marriage as the definition of a man and a woman. *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1972), dismissed for lack of substantial federal question, 409 U.S. 810 (1973). Such a dismissal is a decision on the merits binding in future cases. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

FEDERAL COURT PRECEDENT APPLYING RATIONAL BASIS TO SEXUAL ORIENTATION

Contrary to the Administration's suggestion, the great weight of federal court precedent supports application of the deferential rational basis standard to classifications involving sexual orientation (though, it should be noted, marriage laws do not mention orientation of the parties). The following federal courts have applied this standard:

- U.S. Supreme Court. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996)
- First Circuit. *Cook v. Gates*, 528 F.3d 42, 60-62 (1st Cir. 2008)
- Second Circuit. *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (applying rational basis review without deciding whether a higher standard would be warranted)
- Fourth Circuit. *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*)
- Fifth Circuit. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985)(*en banc*)
- Sixth Circuit. *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 261 (6th Cir. 2006); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265-68 & n. 2
- (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289, 292-93 & nn. 1-2 (6th Cir. 1997)
- Seventh Circuit. *Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002), *id.* at 957 (Posner, J., concurring); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n. 8 (7th Cir. 1989)
- Eighth Circuit. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Richenberg v. Perry*, 97 F.3d 256, 260 & n. 5 (8th Cir. 1996); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976)
- Ninth Circuit. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997); *Meinhold v. United States Department of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). A panel decision of the Ninth Circuit holding otherwise, *see Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), was later withdrawn on rehearing. *See Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (*en banc*).
- Tenth Circuit. *Price-Cornelison*, 524 F.3d 1103, 1113-14 & n. 9 (10th Cir. 2008); *Milligan-Hitt v. Board of Trustees of Sheridan County School District No. 2*, 523 F.3d 1219, 1232-34 (10th Cir. 2008); *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854-55 (10th Cir. 1995); *Jantz v. Muci*, 976 F.2d 623, 627-30 & n.3 (10th Cir. 1992); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985)
- Eleventh Circuit. *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 817-18 & n. 16 (11th Cir. 2004)
- D.C. Circuit. *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (*en banc*); *Padula v. Webster*, 822 F.2d 97, 101-04 (D.C. Cir. 1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989).

A more detailed discussion of this question can be found in Paul Benjamin Linton, "A Response to the Administration's Decision Not to Defend Section 3 of the Defense of Marriage Act," The Thomas More Society, available online at http://www.alliancealert.org/2011/20110301.pdf.

PREPARED STATEMENT OF MAGGIE GALLAGHER

*Maggie Gallagher**

In this essay, I have a limited goal. I want to make visible to gay marriage supporters the way the world looks to the majority of Americans who disagree with them.[1] For many supporters, gay marriage is primarily—indeed, almost exclusively—about what we as a society think about gay people. That is an important issue.

But for the stubborn majority of the American people who do not support gay marriage,[2] the issue looks rather different. Even as Americans move rapidly toward a position of tolerance of gay people, many are drawing the line around marriage.[3] Many Americans recognize at least some other goods are at stake in the gay marriage debate.

To gay marriage supporters I would say: By the end of this essay, even if you retain your firm belief that gay marriage is the right answer, I hope you develop a new respect towards those Americans who disagree with you, and acknowledge that at least some of their concerns are noble and not rooted in hatred, prejudice, or unreason. In the current environment, this in itself is an ambitious goal.

I want to speak on behalf of the majority of Americans who oppose same-sex marriage even as they favor anti-discrimination,[4] allowing "gay men and lesbians" to serve openly in the military,[5] allowing gay teachers in

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1. *See* Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP, May 24, 2010, http://www.gallup.com/poll/128291/Americans-Opposition-Gay-Marriage-Eases-Slightly.aspx (showing 53% of Americans oppose legalizing gay marriage, and 44% support legalizing gay marriage).

2. *See id.*

3. *See* PEW FORUM ON RELIGION & PUB. LIFE & PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MAJORITY CONTINUES TO SUPPORT CIVIL UNIONS: MOST STILL OPPOSE SAME-SEX MARRIAGE 1–2 (2009), *available at* http://people-press.org/reports/pdf/553.pdf (showing 57% of Americans support legalizing civil unions, but only 39% support legalizing gay marriage).

4. *See* Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*, GALLUP, May 29, 2007, http://www.gallup.com/poll/27694/tolerance-gay-rights-highwater-mark.aspx (showing 59% of Americans believe "homosexual relations between consenting adults" should be legal).

5. *See* CBS/NEW YORK TIMES POLL, GAYS IN THE MILITARY (2010),

schools,[6] and dismantling the legal and cultural disabilities on gay people.[7] This combination of powerful endorsements of tolerance and continued concern about marriage should at least make one pause before concluding that the only reason the American people oppose same-sex marriage is a dislike of—or even hostility toward—gay people.

My argument for retaining our historic understanding of marriage is not merely a consequentialist argument, although I do believe there will be consequences to gay marriage. The core argument I wish to advance is that marriage is not discriminatory; there are key differences between same-sex and opposite-sex couples with regard to legitimate public purposes of civil marriage. It is not discrimination to treat different relationships differently.[8]

To win the argument that marriage is not discriminatory implies very little about alternative ways we deal with gay people in our society. We may wish to provide civil unions and domestic partnerships for non-marital same-sex couples. We may look for other ways to address our new social problem: how do we demonstrate social respect and concern for the gay people in our midst?

But regardless of whether, and how, we explore alternative strategies for meeting the legitimate needs of gay and lesbian people, the core question in the marriage debate will remain: Is our marriage tradition discriminatory? If the answer is yes, then one cannot buy the right to discriminate with civil unions or anything else. If the answer is no, then the decision to offer benefits to same-sex couples is no longer driven by rights or equality, but by compassion and civility.

If the question we faced was primarily about which legal benefits could be extended to same-sex couples, American society would turn its

http://www.cbsnews.com/htdocs/pdf/poll_021110_2pm.pdf?tag=contentMain;contentBody (showing 70% of Americans favor allowing "gay men and lesbians" to serve in the military, while only 59% support allowing "homosexuals" to serve).

6. *See* Kyle Dropp & Jon Cohen, *Acceptance of Gay People in Military Grows Dramatically*, WASH. POST, July 19, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/18/AR2008071802561.html (showing only 28% of Americans believe "local school boards should have the right to fire teachers known to be gay . . . down sharply from the 51% who said so in 1987").

7. *See* Saad, *supra* note 4.

8. *Cf.* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 577–85 (1983) (exploring the concept of equality under Aristotle's definition that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness").

attention to cutting and slicing and figuring out how to do it. But the question of benefits is not really the main question for either side in this marriage debate. The core question is fundamentally a moral one: is our marriage tradition good or is it discriminatory? This is the reason the debate is so hot and so difficult to compromise.

The second core idea I am going to present is that marriage is not a relationship invented by the government.[9] Marriage is primarily and most importantly a social institution, with deep roots in nature, but which requires support from law, culture, and society if marriage is to matter at all.

Nor is the law, in my view, the *main* support for marriage. The civil law cooperates in the task of creating a marriage culture which matters, but in fact, the legal institution of marriage is at this point relatively weak, as the increasing number of cohabiters demonstrates.[10] But even when the law was a stronger player, the most important thing about marriage was that it was—and still is—a social institution.[11]

For marriage to matter it has to be a social institution powerful enough to actually change the sexual behavior of people, both the married and the unmarried. The main public good of marriage is to bring together mothers and fathers into stable unions, in which they raise their children together.[12] What must a young person attracted to the opposite sex do to ensure his or her children are raised by their mother and father? There are

9. *See* F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in* Reference re Same-Sex Marriage, 42 ALTA. L. REV. 1099, 1111–15 (2005) (discussing the development of marriage as a religious institution and noting that "[t]he state came to marriage even later than did the Church").

10. *See* Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 1, 38 (2004) ("Once, two very great legal goodies were distributed exclusively to married couples by the law: First, the right to have sex. Having nonmarital sex subjected a person to potential criminal penalties, however rarely enforced, from fornication through adultery and sodomy. Second, legal paternity, meaning for men the right to care and custody of one's children, and for women the right to claim a father's financial support."); *see also* INST. FOR AM. VALUES & INST. FOR MARRIAGE & PUB. POLICY, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 12–14 (2006), *available at* http://www.marriagedebate.com/pdf/imapp.mlawstmnt.pdf (detailing concerns about the ways in which the law has deinstitutionalized marriage).

11. *See generally* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis ed., 1985); GEORGE P. MURDOCK, SOCIAL STRUCTURE 260–83 (1949) (examining the history of marriage and discussing marriage as a social institution).

12. *See* MURDOCK, *supra* note 11, at 1–22.

a variety of potential mechanisms—though we do not always agree in this society on which are appropriate—ranging from abstaining from sexual relationships until marriage to using contraception in every sexual act outside of marriage to having an abortion if necessary. There are some interim steps that would reduce the risk of family fragmentation, such as confining one's sexual relationships to serious, committed, and loving relationships that could become marriages were a child to arise from the union. After marriage, that same young person must be absolutely sexually faithful to ensure children are not created outside the union by either partner.

Each of these potential strategies is effortful. In the absence of social norms surrounding marriage that are strong enough to affect sexual behavior, the default situation for sexual relations among men and women is the creation of babies across multiple households at random and irregular intervals, circumstances in which anything resembling joint parenting becomes increasingly difficult to accomplish.

Influencing sexual passion is difficult. Regulating sexual behavior is challenging. Creating norms that support marital fidelity, permanence, and postponing childbearing until marriage requires enormous effort and energy on the part of society's main players: parents, family, friends, neighbors, educators, religious congregations, psychologists, counselors, and child care professionals.

Without a rich, complex matrix of attitudes, values, and practices that support the reality of the marriage as a social institution, entering into marriage has relatively little significance—it will not matter much. The most important thing about marriage is that it is first and foremost a social institution and not merely a legal construct.

This distinction highlights the ways in which conceiving the marriage debate primarily as a constitutional debate misses the main point of marriage. If the law constructs marriage, then changing the law will necessarily change the construct. If you change the law of corporations, corporations will be different afterward. But if the law of marriage becomes sufficiently disassociated from the social concept of marriage, the law becomes ineffectual in key ways. This has consequences both for marriage as we now understand it and for gay marriage as advocates wish society to understand it.

So why is the law involved in this thing called marriage? Let me tell you first what the answer is not. Civil marriage did not arise because we want to demonstrate special respect for certain intimate adult relationships.

In the Anglo–American legal tradition, the way we demonstrate the sanctity, importance, and intimacy of an adult personal relationship is not to surround it by a lot of government regulations. In general, as the adult relationship becomes more important, personal, and intimate, the law is less likely to regulate it.

For example, I am an aunt, a best friend, a godmother, a mentor, a coach, a sister—and the law touches these relationships only peripherally, if at all. The general rule is the law regulates commercial adult relationships, not personal ones.

So why is the law involved? What is the public purpose? Why is the government involved in marriage? The history of family law in this country provides a clear answer, historically speaking. The answer, which may strike postmodern ears as very odd, is described repeatedly in a very long line of Supreme Court and lower court decisions: the primary public purpose of marriage was to regulate sexual relationships that could create children.[13]

13. *See, e.g.*, Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); Maynard v. Hill, 125 U.S. 190, 211 (1888) ("[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."); Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (observing a "state has a compelling interest in encouraging and fostering procreation of the race"), *aff'd* 673 F.2d 1036 (9th Cir. 1982); Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451, 463–64 (Ariz. Ct. App. 2003) ("We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."); Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (blending the expressive and emotional value of marriage with its social function: "the structure of society itself largely depends upon the institution of marriage . . . . The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."); Dean v. District of Columbia, 653 A.2d 307, 337 (D.C. 1995) (Ferren, J., concurring and dissenting) (explaining the "central purpose of the marriage statute—this emphasis on childbearing—provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples" (internal citation omitted)); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); Carris v. Carris, 24 N.J. Eq. 516, 524 (1873) ("'One of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union.'" (quoting Reynolds v. Reynolds, 85 Mass. (3 Allen) 605, 609 (1862))); Williams v. Witt, 235 A.2d 902, 903 (N.J. Super. Ct. App. Div. 1967) ("[S]ince procreation is considered to be an essential element of the marriage, there exists an implied promise at the time of the marriage to raise a family. An undisclosed contrary intention, therefore, constitutes a fraud going to an essential of the marriage.")

How does marriage do this? First, it solves the problem of random reproduction—that is, of children being created as a result of a relatively random sexual encounter—in which adults are neither prepared nor committed to raising the child together.[14]

Each pair of husband and wife, regardless of whether they have children from their union, help serve this purpose of protecting children. This man and this woman will not, if they are faithful to their vows, produce fatherless children across multiple households.

Moreover, marriage regulates even the behavior of young people who are not married. How do you, as a single person, know if you are having an out-of-wedlock child, or committing adultery? The bright legal line of marriage provides important information that makes cultural efforts to sustain the sexual norms surrounding marriage possible.

Inversely, marriage itself not only prevents harms, it maximizes the possibilities for the social ideal: children will be born to, and raised by, the man and the woman who conceived them. Marriage dramatically increases the likelihood more children will be raised by their own mother and father. We know there are substantial advantages to children who are born to and raised by their own married mothers and fathers.[15] We also know the majority of children conceived in marital unions will enjoy this great good.[16] Conversely, very few children conceived in other unions will enjoy this great good.[17]

(citations omitted).

14. Excluding miscarriages, 49% of all pregnancies in 1994 were unintended. Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 FAM. PLAN. PERSP. 24, 24 (1998). In 1944, almost half of all women aged 15–44 have had at least one unplanned pregnancy in their lives. *Id.* According to the same study, by their thirties, 60% of American women have had at least one unintended pregnancy. *See id.* at 29. The study also estimates almost four in ten women aged 40–44 has had at least one unplanned pregnancy resulting in birth. *Id.*

15. KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT? 6 (2002), *available at* http://www.childtrends.org/files/marriagerb602.pdf (noting social science research "demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. . . . There is thus value for children in promoting strong, stable marriages between biological parents.").

16. *See* ELIZABETH TERRY-HUMEN ET AL., CHILD TRENDS, BIRTHS OUTSIDE OF MARRIAGE: PERCEPTIONS VS. REALITY 6 (2001), *available at* http://www.childtrends.org/files/rb_032601.pdf.

17. *See* Sara McLanahan et al., *Unwed Fathers and Fragile Families* 7–8 (Ctr. for

Marriage is a mechanism that simultaneously copes with and celebrates an underlying natural reality. It provides the answer we have arrived at in trying to take the abstract ideal and make it real in the lives of children. Marriage has been in our culture—and in virtually every other culture—a sexual union of male and female. These sexual unions cause unique problems and pose unique opportunities. Only these unions make life and connect those children to their mother and father.

If this is what marriage is—if this is what we continue to believe marriage is in our culture—then same-sex couples do not fit. They do not serve this purpose. In fact they clearly contradict and repudiate it, as a purpose of marriage.

In his closing arguments in the challenge to Prop 8, Ted Olson found this view impossible to understand:

> I don't believe that it's because statements protect procreation among heterosexual persons or the institution of marriage that much of that procreation takes place in—a lot of it doesn't—but that's not what it is, because there is no evidence that one couple or one pair of individuals in this state or in this country will decide, I'm not getting married because those people are getting married. There is no evidence of that.
>
> And there is no evidence that there will be a diminished procreative instinct, God forbid, because people are allowed in the privacy of their homes to enter into an intimate relationship because they want a family like someone else.[18]

Unlike Olson, half of the state supreme courts that have considered this issue have rejected a state constitutional right to same-sex marriage. New York,[19] Washington,[20] and Maryland[21] all rejected the idea that there is a constitutional right to same-sex marriage. They held the definition of marriage is a male–female union—a union of husband and wife—that is

Research on Child Wellbeing, Working Paper No. 98-12, 1998), *available at* http://crew.princeton.edu/workingpapers/wp98-12-FF-McLanahan.pdf.

18. Transcript of Closing Argument at 3003–04, Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010), *available at* http://www.equalrightsfoundation.org/wp-content/uploads/2010/06/Perry-Vol-13-6-16-10.pdf.

19. Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

20. Andersen v. King County, 138 P.3d 963 (Wash. 2006).

21. Conaway v. Deane, 932 A.2d 571 (Md. 2007).

rationally related to a legitimate public purpose,[22] which Professor Lynn Wardle may be responsible for dubbing "responsible procreation."[23]

The majority in the New York high court's ruling did not sound particularly enthusiastic about the idea "responsible procreation" is the best public purpose for marriage, but when faced with the argument that inevitably future generations are going to believe something else, the court said, "we do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives."[24]

The idea marriage has something important to do with procreation was not made up in response to gay marriage. We did not invent it because we do not like gay people. In the hundreds of years prior to this debate, it was an obvious, visible truth to most Americans, and most American judges, that old people could marry and not all married couples had children. It was also true the judges who ruled on procreation understood one can make babies without being married. This was viewed as the problem marriage was attempting to address.

To say as Ted Olson does, that gay marriage is not a profound change in the public meaning of marriage[25] and that legally recognizing gay marriage is just like recognizing marriages of elderly couples,[26] lacks intellectual weight, or the capacity to comprehend the historic views of marriage.

Olson's view makes sense only to be for whom marriage is only about love and caring. Our society supports the idea marriage is the ultimate celebration of romantic love.[27] For people who understand marriage in this way, adding same-sex couples is a no-brainer. Under this view of marriage,

22. *See Conaway*, 932 A.2d at 630; *Hernandez*, 855 N.E.2d at 11–12, *Andersen*, 138 P.3d at 990.

23. Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 781–84 (2001).

24. *Hernandez*, 855 N.E.2d at 12.

25. *See* Transcript of Closing Argument, *supra* note 18, at 3003–04 (Ted Olson speaking).

26. Ted Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 9, 2010, *available at* http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html.

27. *See, e.g.*, Transcript of Closing Argument, *supra* note 18, at 2975 (Ted Olson speaking) ("The plaintiffs have said that marriage means to them . . . a public commitment to the world.").

if you can romance and commit, you can marry.[28]

But let us recognize from a historical perspective, and from the perspective of millions of Americans, treating same-sex unions as marriage greatly alters the institutional and public understanding of marriage.[29] It will, as many gay marriage advocates have recognized, "announce that marriage has changed shape" because, "if same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers."[30] E.J. Graff believes marriage has already become so severed from procreation in modern conditions that recognition of gay marriage currently "fits."[31]

Of course, the simple fact that marriage has a historic public purpose of "responsible procreation" cannot be dispositive. The question remains: Do we still need a social institution understood in this way? From a constitutional-law perspective, this is the key question in determining whether there is a constitutional right to same-sex marriage. (Even if there is no constitutional right to same-sex marriage, that still does not end the inquiry. There are ways to get to same-sex marriage other than by viewing it as a fundamental right—like legislation.)[32]

Why am I involved in this debate? Let me give you my answer. I could be doing a lot of things with my time. It is not really the pathway to riches, and the kind of celebrity that you get is not particularly desirable. I came into this discussion as a result of a twenty-year debate on family fragmentation, high rates of divorce and unwed childbearing, and dissolution of social and cultural norms that were leading to the reality many children (including my oldest son, who was born out of wedlock)

28. DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 213–15 (2009).

29. Transcript of Closing Argument, *supra* note 18, at 3045 (Charles Cooper speaking) (stating many people have a different view of the role and function of marriage since the gay-marriage movement began).

30. E.J. Graff, *Retying the Knot*, *in* SAME-SEX MARRIAGE: PRO AND CON 135, 137 (Andrew Sullivan ed., 2004).

31. E-mail from E.J. Graff, Resident Scholar, Brandeis Women's Studies Research Center, to Maggie Gallagher, President, Institute for Marriage and Public Policy (Aug. 31, 2010, 08:31 CST) (on file with author).

32. For example, Maine's legislature passed a law banning marriage discrimination, which would have allowed same-sex marriages; however, the law was overturned six months after it was passed. *See* 2009 Me. Laws c. 82, §1; Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, BOSTON GLOBE, Nov. 4, 2009, *available at* http://www.boston.com/news/local/maine/articles/2009/11/04/maine_voters_overturn_states_new_same_sex_marriage_law/?page=1.

were being raised without an effective relationship to their fathers and many women were left parenting alone.[33] Eventually I came to believe our endorsement of all family forms would also dehumanize men by telling them they were not important to the task of creating and raising new human life.

For me, the gay marriage debate is primarily a debate about marriage, and the place to begin is to recognize marriage is a nearly universal social institution. It exists in virtually every known human society.[34] These marriage institutions are often wildly different. They do not necessarily look very much like what I mean by marriage in important particulars. Marriage changes, adapts, and evolves.[35] But marriage as an opposite-sex sexual union also emerges again and again in completely diverse human societies.

Marriage emerges with many differences but also with the same basic shape. Marriage is generally a sexual union, not some other kind of relationship. It is also a public union,[36] not just a private, personal, and intimate union—that is the difference between a spouse and a lover. Finally, marriage is a union in which the rights and responsibilities between the man and woman[37] toward each other and toward any children her body

33. *See* COAL. FOR MARRIAGE, FAMILY & COUPLES EDUC., INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 1 (2000), *available at* http://www.americanvalues.org/pdfs/marriagemovement.pdf.

34. BLANKENHORN, *supra* note 28, at 105–06; *see also* WILLIAM J. DOHERTY ET AL., INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 8–9 (2002).

35. BLANKENHORN, *supra* note 28, at 91.

36. Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGER IN CANADA'S NEW SOCIAL EXPERIMENT 45 (Daniel Cere & Douglas Farrow eds., 2004) ("Comparative research on the worldviews of both small-scale societies and those of world religions, both Western and Eastern, reveals a pattern: Marriage has universal, nearly universal, and variable features. Its *universal* features include the fact that marriage is (a) supported by authority and incentives; (b) recognizes the interdependence of men and women; (c) has a public, or communal, dimension; (d) defines eligible partners; (e) encourages procreation under specific conditions; and (f) provides mutual support not only between men and women, but also between them and children.").

37. It is a union between at least one man and one woman because polygamy is, frankly, a common human variant, especially among small tribal societies. Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis: Final Report for Status of Women Canada* 22–28 (McGill Univ., Working Paper Series, H3A 1W9, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360230 (surveying worldwide polygamy practices and national laws governing them).

produces are publicly defined and supported.[38] This means we do not leave it up to adolescents in the throes of erotic, romantic, sexual, and psychological drama to work out on their own what this whole big dimension of human experience means.

The institution of marriage attempts to connect sex, love, babies, caretaking, and mothers and fathers without requiring every individual person to stumble upon these moral truths and natural realities all on their own. That is what institutions are for—they are substitutes for the process of requiring individuals, on their own, to figure out best practices without any aid from civilization.[39]

I am not saying that just because marriage has always been this way, it cannot be changed. I am raising this truth to point to a different question: why does this basic marriage shape emerge over and over again?

Why is it that in the steppes of Asia, the jungles of the Amazon, and the deserts of Africa, with completely disconnected societies—different economies, different ecologies, different cultures, and different religious traditions—humans continually arrive at the same basic idea of marriage? If you ask the question, the answer is not hard to find. Marriage is a response to a real, persistent, and virtually universal need in human cultures.

Marriage, as a universal human idea, has deep roots in three persistent truths about humans.

The first truth is that the vast majority of us are powerfully attracted, and not by reason, to an act that, without a great deal of effort, makes human life. Sex between men and women makes babies. The second truth is society needs babies. Reproduction is optional for the individual; not everyone has to do it. But only those cultures that find a way to grapple with the procreative implications of male and female attraction have survived.

The third idea on which marriage is based is children ought to have a father, as well as a mother. It is fatherhood that is conceptually most at stake in the marriage debate.[40] Since I was a young girl, our society has

38. BLANKENHORN, *supra* note 28, at 99–102.

39. *See id.* at 97–99.

40. *See* Jason S. Carroll & David C. Dollahite, *"Who's My Daddy?" How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America*, *in* WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 47, 59–64 (Lynn D. Wardle ed., 2008).

been in the middle of a big roaring tussle about gender and what it means in both public and private life. For the moment, let us put the question of gender differences to one side. I am not saying men are more important than women or fathers are more important than mothers or vice versa. I am not even necessarily saying mothers and fathers parent differently, even though I really believe they do somewhat.[41]

The truth I am pointing to is more basic. Let me put it this way, when a baby is born, there is bound to be a mother close-by. If we want fathers to be there for their children and for the mothers of their children, biology alone will not take us very far.[42] We need a cultural mechanism powerful enough not only to attach fathers to the mother–child bond, but also to affect the sexual and romantic behavior of the young people in the middle of their romantic, sexual, erotic, emotional, psychological dramas. Absent a socially powerful institution of marriage, the default position for male–female attraction is the creation of many children who will be cared for by only one parent, if that.

We are in the middle of a marriage crisis. Gay people did not cause the marriage crisis, and they cannot cure it. But this marriage crisis has everything to do with the question: how much do we care about whether children have mothers and fathers and how much do we believe that marriage is about getting this good for children? Resolving this crisis will require reconnecting marriage to its core public task of creating a society in which children are raised by their mother and father in the same family unit. We do not want to sever marriage from love or romance, but to reconnect it to a larger mission. In doing so, the goal is to make romance the friend and not the enemy of the children it creates.

If government changes the legal definition of marriage, what happens to marriage itself? As a matter of justice, gay marriage advocates ought to examine their goals. Marriage has power, not because of the legal words, but because it is a social institution, which the law recognizes and supports. They are proposing to change the meaning of some of the most important identity-producing words by which Americans live. One of them is marriage. For those of us who oppose gay marriage, marriage is not something separate from the union of husband and wife. Marriage IS the

41. *See* W. Bradford Wilcox, *Five Myths on Fathers and Family*, NAT'L REV. ONLINE, June 19, 2009, *available at* http://familyrights.us/armory/bin/Five%20Myths%20on%20Fathers%20and%20Family.pdf.

42. *See* DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 18–22 (1995).

union of husband and wife, intrinsically connected to the good of making life and connecting those children to the man and woman who made them. Gay rights activists are asking them to change marriage itself, along with other important identity-producing words, such as "husband."

Right now, a husband is a man who disciplines his sexual drive to take on the responsibility for his wife and their children. In adopting gay unions as marriages, the law will change the meaning of "husband," "wife," "mother," and "father" for the broader culture. Currently, these words are complementary and interconnected. Husband points to wife. Mother points to father. Together they point to the child. This classification system was not merely invented by politicians; it has deep roots in nature and civil society.

The first problem caused by redefining marriage is linguistic. By way of an analogy: What if the government passes a law changing the word "cat" to mean "either cat or dog" because cats and dogs are really rather similar? They are both small, furry animals with four legs and a tail, and we keep them as domestic pets. We might not be able to point to the specific problem or the way it was created. But, there would not be a word that means cat. If it is important we be able to talk about cats and their specific characteristics, the law is going to be a problem.

It is going be difficult to rebuild a culture that reconnects marriage with its erstwhile core public purpose of connecting sex, love, commitment, and babies with mothers and fathers, if the word that means "marriage" no longer points in that direction. Culture consists of words, images, ideas, classification. The government takeover of the word "marriage" is a problem in itself.

The problems intensify when the reason the courts are taking over this word, is that the historic understanding of marriage is now judged bigoted and discriminatory. How do you teach the next generation that "marriage matters because children need a mom and dad" when the law is saying: a. that is not the purpose of marriage and b. the idea that children need a mom and dad is discredited bigotry?

The core argument for gay marriage is there is no morally relevant difference between same-sex and opposite-sex couples. If that is what the law is endorsing in endorsing same-sex marriage, it is going to affect a lot of people.

Equality is the state religion. If you disagree with the state religion of equality, the law intervenes powerfully to repress you and your ideas. This

is not a complaint. It is the attempt at objective analysis by thinking through how gay marriage is likely to affect marriage as a social institution. The cultural energy for the task of reconnecting sex, love, babies, mothers, and fathers, is most likely to come from traditional religious groups. Same-sex marriage will put traditional religious groups in new legal peril. Moreover, the government will begin using the law to repress this view of marriage, exactly at the moment when marriage needs to be strengthened if we are to have hope of building a stronger marriage culture.

I do not know if anyone will be persuaded by these arguments. Nevertheless, I can suggest some alternative ideas about how supporters of gay marriage can use this information. If I am right about the importance of marriage as a social institution, the important thing is to stop pursuing a constitutional right to same-sex marriage as the movement's key goal.

If the goal is to actually get gay marriages and unions respected as "genuine" marriages by Americans, gay marriage advocates have the hard task of persuading Americans that it is true, and that gay marriage is a good idea.

Second, both sides need to find ways to reduce the ugliness of the moral clash involved in the same-sex marriage debate. I do not know if this ugliness is disturbing to gay marriage advocates or not, and in some ways it is unavoidable. Either way, I have begun to think about the underlying causes and how to at least lessen the ugliness of the clashes.

One way to lessen the intensity of the clash is to understand, at the very least, how a good person might disagree with you, even if they are wrong. Half of Americans believe it is wrong for two men to have sex with each other, but nonetheless endorse the rights of gay people in society in a broad way.[43] What is tolerance? Tolerance is not endorsing the idea we are all the same and therefore there are no important differences. Tolerance is the difficult moral virtue of endorsing the rights of people with whom you morally disagree.

Most Americans, particularly religious Americans, are working pretty hard to figure out a response that leads to a genuine culture of pluralism and tolerance. However, people in traditional faith communities want to respond without losing the right to their own moral views, as the race analogy requires of us.

43. *See* Saad, *supra* note 4 (showing that 47% believe homosexual relations are morally wrong, but 89% feel homosexuals should have equal rights for job opportunities).

If we can all recognize some good on both sides of the argument, regardless of the ultimate outcome, it would be a different America than where we are heading now.

I do not believe all gay marriage supporters really believe the opposition to gay marriage stems from bigotry that is the moral equivalent of racism. I do not think they really believe grandma is like George Wallace, trying to keep black people down. California's willingness to offer civil unions but unwillingness to offer same-sex marriage is not at all like Jim Crow—and to equate the two is a morally preposterous smear.

If some reading this essay conclude that even if they think their opponents are wrong, our historic understanding of marriage is not rooted in hatred or prejudice, that there are some goods at stake in this debate, that would be social and moral progress.

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Federal Marriage Amendment: Yes or No?

(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman

Maggie Gallagher

Fides et Iustitia

ARTICLE

(HOW) WILL GAY MARRIAGE WEAKEN MARRIAGE AS A SOCIAL INSTITUTION: A REPLY TO ANDREW KOPPELMAN

MAGGIE GALLAGHER*

In his provocative essay, Andrew Koppelman reiterates the new conventional wisdom: arguments against gay marriage are failing, and the future of gay marriage is practically assured. Opponents of same-sex marriage are, he says, "tongue tied":

> Life in a democratic and pluralist society tends to promote more egalitarian attitudes toward differences of gender and sexual orientation. That's reflected in the generational divide over same-sex marriage: while most Americans oppose it, most 18-to-29-year-olds are in favor.
>
> . . .
>
> The story of opposition to same-sex marriage is one of steady decay.[1]

Indeed, Koppelman describes the case against gay marriage as so irrational as to be something close to evidence of mental illness. Those of us opposed to gay marriage are: "blasting away at invisible phantoms . . . insulat[ed] from reality," displaying an unseemly "eagerness to scapegoat innocent people," and rather like those ignorant Salem villagers who hunted down witches, "unable to understand the forces . . . transforming their world." Opposition to gay marriage is thus merely "a report of a mental association," which amounts to "magical thinking":

"Gay people appear to be in some way associated in many people's minds with social trends that they dislike."[2]

Scholars don't usually talk like this.

Predicting the future is an inherently chancy, and perhaps even an essentially unscholarly enterprise. But let me plunge ahead anyway and sug-

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1. Andrew Koppelman, *The Decline and Fall of the Case against Same-Sex Marriage*, 2 U. St. Thomas L.J. 5, 32 (2004).

2. *Id.* at 30.

gest that to the contrary: Support for gay marriage may have peaked in 2003 in the United States, and intellectually the arguments against it are powerfully resurgent.

What do I mean by this? How can I possibly believe this? Before my mental competence is called into question by the good professor, let me explain. In small part, I mean the supposed inevitability of gay marriage is belied by recent developments in public opinion, particularly next generation opinion.[3]

But more substantively, I suggest that the arguments in favor of gay marriage, developed over the last thirty years, have largely stopped developing. These arguments have had a powerful impact on public opinion, particularly legal elites, over the same period. But to these now well-worn arguments, little new has been added in recent months or even years.

This may be because for many years, the same-sex marriage debate has been a legal debate, mostly confined to lawyers, judges, and legal scholars, few of whom have any particular background in marriage at all. With the advent of *Goodridge v. Department of Public Health*, a debate that was once theoretical and primarily about homosexuality is beginning to attract new attention from a broader array of serious marriage scholars and thinkers.[4] A more serious consideration of the consequences of same-sex marriage for marriage is thus only in the beginning stages.

Let me add: the apparent inability of same-sex marriage advocates to recognize or respond to this newer critique is powerfully on display in Koppelman's own essay.

I hope at a minimum to persuade scholars like Prof. Koppelman that at its core the case against same-sex marriage has little to do with any mental associations about gay folk, positive or negative. I hope in short, to at least "achieve disagreement," to spark a serious debate about the public purposes of marriage and of how the law can and should sustain marriage as a social

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3. *See infra* section IV(D)(4).

4. *See e.g.* Don Browning & Elizabeth Marquardt, *A Marriage Made in History?*, N.Y. Times A25 (Mar. 9, 2004); Dan Cere, *Wars of the Ring: Revisioning Marriage in Postmodern Culture*, Montreal Gaz. (Mar. 30, 2002); Mary Ann Glendon, *For Better or for Worse?*, Wall St. J. A14 (Feb. 25, 2004). For a summary of my own recent contributions to this debate, *see e.g.* Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-*Lawrence *World*, 23 Quinnipiac L. Rev. 447 (2004); Maggie Gallagher, Speech, *Does Sex Make Babies?* (Geneva, Switz., Aug. 23, 2004) (copy of transcript on file with author); Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 Margins 161 (2004) [hereinafter *Do Moms and Dads Matter?*]; Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 Notre Dame J.L. Ethics & Pub. Pol'y 225 (2004) [hereinafter *Rites, Rights, and Social Institutions*]; Maggie Gallagher, *What Marriage Is For*, 8 Wkly. Stand. 45 (Aug. 4, 2003); Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773 (2002) [hereinafter *What Is Marriage For?*].

institution, and therefore what the consequences of legally redefining marriage as a unisex relationship are likely to be.

I. WHAT IS MARRIAGE? HOW DOES THE LAW SUSTAIN MARRIAGE AS A SOCIAL INSTITUTION?

In order to seriously consider whether same-sex marriage will help or hurt marriage as a social institution, the first thing we need is some working theory of what role the law currently plays in creating and sustaining marriage.

Advocates of same-sex marriage advance two mostly implicit theories about the relationship between law and marriage. The first is that marriage law consists of a package of benefits we give to reward and facilitate those who undertake marital responsibilities. The second (related) theory is that marriage itself is a product of the laws that produce and define it. Marriage is a legal construct, like the corporation, with no intrinsic purpose or function at all. In this view, marriage does not refer to any larger reality outside the law. Marriage is simply whatever the law defines it as.

A. *Marriage as a benefits package*

Since the advent of the gay marriage debate, the most prominent way of thinking about the relationship between law and marriage is to say that the law provides important marriage "benefits."[5]

As the *Goodridge* majority put it, "tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what

5. "Some federal and state laws, as well as many private entities, encourage marriage by providing potentially valuable and unique incentives to couples who marry, while withholding these benefits from individuals and couples who do not. Although such incentives may not have a strong effect on a couple's decision to marry, they are valuable, tangible privileges attendant to participation in marriage." Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. Rev. 595, 598 (2004) (Suffredini is co-chair of the National Lesbian and Gay Law Association and Findley is also on the board of directors of that organization). *See also* Richard Lacayo, *For Better or for Worse?*, Time 26 (Mar. 8, 2004) ("[President George Bush and Senator John Kerry] both oppose gay marriage and would oppose extending the 1,138 federal rights and privileges to gay couples, but support the right of states to grant civil unions."); Dennis M. Mahoney, *Ex-Local Minister Calls Gay Marriages Just*, Columbus Dispatch 4E (Apr. 2, 2004) (" 'There are over 1,000 benefits that come with civil marriage that are recognized by state and federal government that we don't have access to,' [Rev. Kay Greenleaf] said."); Chuanpis Santilukka, *Same-Sex Benefits Key to Marriage Debate*, St. Cloud Times 4A (Mar. 24, 2004) ("In 1997, congressional accountants identified 1,049 federal laws that gave benefits, rights or privileges to married couples."); Evelyn Nieves & Jim VandeHei, *Kerry Backs Benefits for Legally United Gays*, Wash. Post A6 (Mar. 4, 2004); Dean E. Murphy, *For a Day, Same-Sex Pairs Get a Warm Reception*, N.Y. Times A14 (Feb. 23, 2004) (quoting a woman who with her lesbian partner had recently obtained a marriage license in San Francisco); Gen. Acctg. Off. Rept., *1,049 Federal Laws in which Marital Status Is a Factor* (Jan. 31, 1997) (available at http://www.marriageequality.org/facts.php?page=1049_federal).

might otherwise be a burdensome degree of government regulation of their activities."[6]

Andrew Koppelman divides the marriage debate into two parts: (1) a "sanctification" narrative or "normative" meaning of marriage, which he calls a debate over "what relationships to value or even to sanctify"; and (2) an "administrative" debate, or: "the more mundane questions of how resources should be allocated and unfair disruption of people's lives prevented."[7]

Note that under even the allegedly "mundane" and merely administrative debate, Koppelman, being human, cannot help smuggling in an important moral question: what exactly constitutes "unfair disruption" of people's lives?[8]

One could argue, and it would be true, that Koppelman cannot even answer his own question about the unfairness of giving marriage benefits only to married husbands and wives, without some alternate theory about what kind of relationships are entitled to these or similar benefits. He offers a brief attempt (benefits should go to existing relationships of dependency that particular individuals value[9]) but to this theory questions immediately arise: if same-sex marriage benefits must be granted under this line of reasoning, why not polygamy?[10] Why do couples caring for each other have to be in a sexual relationship? Why not offer these benefits to adults living in parent-child couples; single moms with their adult sons, for example, who arguably engage in even more caretaking than at least some married folks? Why are best friends who are not sexually intimate excluded from marriage benefits? Why can't I marry my sister and raise kids with her—provided I obey incest laws?

All of these relationships of dependency meet Prof. Koppelman's criteria: They exist right now, whether we like it or not.[11] People are living in

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6. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

7. Koppelman, *supra* n. 1, at 11.

8. *Id.*

9. Like it or not, households, of whatever kind, and relationships of dependency exist. From those relationships, one can reasonably infer what the members of those households would want and need if some unprovided-for contingency arises, such as the illness or death of one of them. From this perspective, law ought to maximize welfare by reflecting people's preferences and providing the default options that they would probably have chosen had they been able to think about it. The task of constructing the law of marriage is analogous to the task of constructing the law of business corporations: How can the state maximize efficiency and satisfy people's preferences about their relationships by constructing sensible 'one size fits all' default rules, while protecting the interests of third parties, notably children? Here it all turns on what we know about the effects of various practices and policies. And issues of sanctification are very far from our minds.

Id. at 11-12.

10. Indeed, Koppelman seems to suggest there is no particular reason why not polygamy, which like same-sex marriage has multiple social meanings and therefore no particularly likely negative consequences. *Id.* at 29.

11. *Id.* at 11.

polygamous households, with sisters, with best friends, with aunts, with cousins, with mothers, with fathers, and even (sometimes) raising children in these households. Why doesn't the law administrate marriage "benefits" to all of them, or at least all who want to claim them?

I am not arguing that same-sex marriage will lead inevitably to expanding the definition of marriage to include these relationships.[12] The point I am making is this: very few things about our marriage traditions, legal or social, are intelligible under the implicit theory of marriage offered by Koppelman and other advocates of same-sex marriage. Advocates of same-sex marriage cannot explain why marriage exists, or why it should continue to exist, as a distinct legal status. In particular Koppelman's theory of "administrative" marital benefits cannot explain why marriage has existed, or ought to continue to exist, as a distinct legal institution.

What about the other half of marriage that Koppelman proposes, that the law exists to serve a "sanctification" narrative?[13] Here again, Koppelman has difficulty explaining what is distinctive about marriage that would give rise to any special legal treatment, much less a large legal superstructure. If marriage is just another word for a fight about which relationships people socially value, why are so many valuable relationships left out?

We do not typically demonstrate the intrinsic value of personal relationships by subjecting them to legal regulation. In fact, the general rule in law is: the closer, more intimate, more intrinsically valued the relationship, the less likely it is to be regulated by law. I am a best friend, a sister, an aunt, a niece, a neighbor, a granddaughter, and a godmother. All of these relationships are extremely important to me personally, and highly valued socially. Yet they share one characteristic: they are almost totally unregulated by law.

This is true even of personal relationships that give rise to considerable dependency, like the relationships between adult children and aging parents. If my mother is old and sick and in need of my care, I can choose to walk away from her completely and the law cannot touch me; the law will not even try to transform filial obligations into legal ones. It is impersonal relationships—especially commercial ones—that typically give rise to legal regulation, not personal, intimate ones. The one great exception to this general rule in adult relationships is marriage. Why?

The inability to explain why the law is involved in sanctifying this relationship and not others is a core problem with Koppelman's theory of marriage. But there is a deeper problem with Koppelman's idea of dividing marriage into a sanctification narrative and a separate benefits package. It is a problem with all legal theories that assume the law "incentivizes" mar-

12. In my opinion the most likely result of same-sex marriage will not be the expansion of marriage benefits to more and more relationships, but the elimination of marriage as a legal status.

13. Koppelman, *supra* n. 1, at 14.

riage by distributing a package of legal goodies to married couples to reward those who accept its responsibilities. It simply is not true.

Once it was true. Once, two very great legal goodies were distributed exclusively to married couples by the law: First, the right to have sex. Having nonmarital sex subjected a person to potential criminal penalties, however rarely enforced, from fornication through adultery and sodomy. Second, legal paternity, meaning for men the right to care and custody of one's children, and for women the right to claim a father's financial support.

For several generations, for better or for worse (or both), these two former marital benefits have ceased to exist in law. In law (if not in reality), parental support obligations have been severed from marital status, and the concept of legitimacy itself ruled unconstitutional.[14] With *Lawrence v. Texas*, the law not only permits nonmarital sex, it has conferred upon it the sacred status of a constitutional right.[15]

Most of what are now routinely described as marriage benefits are more accurately described as legal incidents of marriage: ways in which the law treats a couple differently if they are married than if they are not.[16] The legal incidents of marriage benefit some couples, but penalize other couples. Or, they benefit one partner and burden the other. Many affect only a tiny fraction of couples (or none at all, such as federal law making provisions for Spanish-American War widows).[17] Very few of them can be described in any straightforward way as a "benefit" of marriage.[18]

What are these legal incidents of marriage? Generally speaking, the law treats you differently if you are married, because the law presumes that marriage makes you and your spouse three things: (a) next of kin, (b) financial partners, and (c) exclusive sexual partners.

Why, for example, must the coroner get the consent of a spouse to perform an autopsy? Why does a wife have the power to direct medical

14. *See e.g. Mills v. Habluetzel*, 456 U.S. 91 (1982) (requiring that illegitimate children be given a bona fide opportunity to prove paternity in seeking parental support); *Trimble v. Gordon*, 430 U.S. 762 (1977) (right of an illegitimate child to inherit from unwed father); *Gomez v. Perez*, 409 U.S. 535 (1973) (ruling that a state may not deny illegitimate children the right to parental support); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (ruling that illegitimate children may not be excluded from recovery of workers' compensation benefits upon the death of a parent); *Levy v. Louisiana*, 391 U.S. 68 (1968) (ruling that state may not exclude illegitimate children from standing to sue for wrongful death of a parent).

15. 539 U.S. 558 (2003).

16. In reviewing federal statutes, the General Accounting Office in 1997 found 1,049 federal statutes "in which marital status is a factor." The GAO specifically notes, however: "no conclusions can be drawn . . . concerning the effect of [a] law on married people versus single people. A particular law may create either advantages or disadvantages for those who are married, or may apply to both married and single people." Gen. Acctg. Off. Rept., *supra* n. 5, at 2.

17. 38 U.S.C. § 1536 (2004).

18. For an analysis of the 1997 GAO report, on which claims of the "1000 federal benefits of marriage" are based, *see* Joshua K. Baker, *1,000 Federal Benefits of Marriage? An Analysis of the 1997 GAO Report*, http://www.imapp.org (May 26. 2004).

treatment if the patient is unable to do so? Is this really a special incentive written into the law in order to encourage people to get married?

In reality, such legal consequences are not benefits or incentives, but rather reflect the law's perception of spouses as each others' closest kin. The law is doing justice to the relation that actually exists between spouses, in our conception of marriage, rather than creating a basket of legal goodies to help reward married couples.

In other cultures, the law may sometimes privilege parent-child relationships over spousal ones—the wife can be lower down the food chain in terms of "next of kin" status. American law treats spouses as "next of kin" because of the influence of our specific religious traditions, which gave rise to the basic normative ideas about marriage encoded in law: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."[19]

Marriage makes a husband and wife legally next of kin. But everyone, single or married, has a legal next of kin, and American law provides many other ways for a person to contract around the default next of kin rules provided by the law (wills, medical powers of attorney, and adoption come to mind). If the current legal devices are inadequate (as some testimony suggests) there is no reason why these methods cannot be strengthened or updated to meet contemporary needs, that is if "helping people live their lives" in the purely administrative sense is the main goal of same-sex marriage advocates.

By describing this cluster of legal consequences of marriage as an administrative "benefit" unfairly denied others, Koppelman probably misunderstands why this package of benefits matters. The automatic granting of "next-of-kin" status is important not because the right to consent to an autopsy is experienced by married couples as a powerful benefit, but because being treated as "next of kin" by the law reinforces—both for the couple and for every person and institution that interacts with the couple—the underlying norm of what marriage is.

This bundle of legal incidents primarily serves, in other words, not an "administrative" purpose, but the underlying normative function—i.e., the "sanctification narrative" of marriage. If the law views marriage seriously as a one-flesh union, with husband and wife becoming each others' closest relative, joined in a permanent financial, parenting, and sexual union, then

19. *Genesis* 2:24 (King James). This points, by the way, to the difficulties of any clear and facile distinction between "religious marriage" and "civil marriage." In the U.S., people have always been able to marry without a religious ceremony. But the legal structure of marriage is deeply influenced by our specific religious traditions about marriage. Which of these conceptions are we allowed to keep and which must be discarded as unduly religious? Monogamy? Mutual fidelity? Primacy of husband and wife over other relations? None of these are human universals. They are the products of a specific marriage tradition deeply rooted in religious ideas. Creating a truly "neutral" marriage system, uninfluenced by any religion, would mean eliminating from the law most of what people mean by marriage.

this is how the law (in doing justice) treats the married couple, *regardless of whether the consequences of this legal bundle is experienced by spouses as a benefit or a burden, or both.* The law treats the couple as married, because that is what they are. In treating them as married, in insisting that other institutions treat them as married, the law helps sustain the public shared (normative) meaning of what marriage is.

Consider similarly the financial implications of marriage law. Married people are often treated by the law as a financial unit, not because this is a benefit that incentivizes marriage (it mostly does not), but because doing so is the only just way to treat the married couple: being financially responsible for each other and sharing income and assets ("all my worldly goods") is part of what marriage means.

Far from benefiting marriage, the federal tax code, for example, continues to "penalize" many married couples: couples who merely live together will often pay lower taxes than a couple who is married because their joint income pushes them into a higher tax bracket.[20] It is true that the husband in some situations—mostly a one-earner married couple with children—will pay less in taxes than he would as a single man. But in these situations the woman must, because of the legal status of marriage, give up an extensive government entitlement package (income support, food stamps, public housing, and medical insurance) that would be available to her as a single mother without either a spouse or an income. What the tax code giveth, the welfare system taketh away. It is not clear in what, if any, circumstance the law provides a net financial benefit based on marital status.[21] Even health insurance is not a clear benefit. Yes, marriage may give access to your spouse's medical insurance. But it can also make you ineligible for free or low-cost medical care from the government.[22]

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20. *See e.g.* National Center for Policy Analysis, *The Marriage Penalty*, http://www.ncpa.org/bg/bg145/ bg145.htm (Feb. 9, 1998). Although legislation intended to ameliorate the marriage penalty for most couples was adopted in 2001, the provisions of the legislation (e.g., increasing the standard deduction for married couples and broadening the 15% tax bracket for married couples) are being gradually implemented through 2010, at which time they expire and the marriage penalty is scheduled to revert to pre-2001 levels. Greg A. Esenwein, *Marriage Tax Penalty Relief Provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001*, CRS Rpt. for Congress (updated Jan. 30, 2003) (Order Code RS21000) (available at http://weller.house.gov/UploadedFiles/TAX%20-%20Marriage%20Tax%20Penalty%20Relief%20Provisions%20of%20the%20Economic%20Growth%20and%20Tax%20Relief%20Reconciliation%20Act%20of%202001.pdf). Even under current law, Gene Steuerle and Adam Carasso conclude, "[i]n aggregate, couples face literally hundreds of billions of dollars in increased taxes or reduced benefits because of marriage." C. Eugene Steuerle & Adam Carasso, *The Hefty Tax on Marriage Vows Facing Most Households with Children*, in *The Future of Children: Marriage and Child Wellbeing* (Sara McLanahan et al. eds., Brookings Instn. Press & Princeton U. forthcoming 2005).

21. Two scholars argue in the forthcoming journal *The Future of Children* that the net effect of the legal status of marriage is large marriage penalties for most couples. *Id.*

22. There is some very limited evidence that Medicaid's marriage penalties have contributed to the rise in out of wedlock births. *See* Aaron S. Yelowitz, *Will Extending Medicaid to Two-Parent Families Encourage Marriage?*, 33 J. Human Resources 833, 858 (1998) (noting that the effects of Medicaid policy on marriage appears to drop when mothers of infants are excluded).

The phantom nature of the marriage-as-administrative-benefits-package promised by same-sex marriage advocates can be seen every time a new jurisdiction offers marriage benefits to same-sex couples. Having been promised that a cornucopia of important benefits resides in marital status, gay people are often dismayed to discover how empty or full of penalties the marriage basket can be. Consider for example a story in the September 20, 2004 *San Francisco Chronicle* about gay couples surprised to find there may be substantial financial penalties in being treated as married under the law.[23]

In 2003, California passed Assembly Bill 205, expanding its domestic partnership law into a full "marriage equivalent."[24] But Randy Cupp of San Francisco has decided not to register with his partner: "If you're going to give us the responsibilities, you need to give us the benefits as well," said Cupp.[25] (Note that Cupp assumes an extensive benefit package associated with marriage must exist somewhere, if not in state law, then in federal law still currently denied to him.)

Cupp and his partner, Jeff Tarvin, are both HIV positive and on disability. If the law were to treat them like a married couple, they would risk losing their Medi-Cal health insurance and/or lose income from California's disability income program because their combined incomes and assets would be used to determine their eligibility for government benefits.[26]

Gay rights advocates acknowledge the concern. "It is absolutely certain that AB205 will affect some public benefits. It's unclear which ones and how," Jane Gelfand, an attorney and benefits counseling program director at Positive Resource Center, a nonprofit for people affected by HIV and AIDS, told the *Chronicle*.[27]

The article also notes concerns about the financial impact of being treated as a married couple under the law among more affluent gays as well: "On the other end of the financial spectrum, some wealthy gays and lesbians are blanching at the prospect of their income, assets—and debt—turning into community property. Under the new law, ending a partnership could entail losing half one's assets, just like divorce."[28]

Patricia Robertson, a professor at UCSF Medical Center and co-director of the Center for Lesbian Health Research, told the reporter that marriage as a legal structure may not be consistent with the best interest or expectation of many same-sex couples:

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23. Rona Marech, *Gays Cautious About New Partners Law: Some Opt Out, Fearing Legal or Financial Troubles*, S.F. Chronicle A1 (Sept. 20, 2004).

24. Cal. Assembly 205, 2003-2004 Reg. Sess. 1 (Jan. 28, 2003).

25. Marech, *supra* n. 23.

26. *Id.*

27. *Id.*

28. *Id.*

> Gay and lesbian relationships have not been as financially intertwined as marriage historically, which was traditionally structured on the basis that women were the property of men. For a lot of LGBT (lesbian, gay, bisexual, and transgender) people, being independent financially is an important part of who they are. To be told by the law that their financial relationship is now expected to mimic that of a married couple is unknown territory.[29]

Finally, she notes that some in the gay community are referring to AB205 as the "gay divorce law." Under current law, breaking up is as simple as filling out a form. With AB205, most couples will have to face court proceedings and spend money on lawyers.[30]

I do not mean to single out gay couples for some sort of special opprobrium for having these very reasonable financial concerns. But I do want to point out that the very concerns they are expressing highlight how difficult it is to imagine that voluntarily subjecting yourself to a burdensome and potentially expensive set of legal regulations called "marriage" can best be understood as signing on for a package of "administrative benefits" to help you live your life.

Couples who have been taught to view marriage this way are bound to be deeply disappointed by what the legal consequences of marriage actually are. Judges, lawmakers, and family scholars who conceptualize marriage in this way are bound to make some pretty big errors about what family law and public policy should be.

None of which is to deny that some same-sex couples in some circumstances will obtain a material benefit if they were allowed to marry and that questions about the justice of the current definition of marriage are perfectly appropriate.[31] My goal here is to dispute the idea that providing something called "benefits" to married couples has very much at all to do with how and why the law of marriage matters to couples, or the larger project of sustaining a marriage culture.

What I am contesting is Koppelman's central assumption that marriage can be intelligibly divided into two halves: a normative function or "sanctification narrative" and a merely administrative benefits package. The legal incidents of marriage arise from and exist to serve the "sanctification" narrative embedded in the law. The law starts with a certain assumption of

29. *Id.*

30. *Id.*

31. There are some legal incidents of marriage that do look like benefits. Those available in the state of Massachusetts, cited in *Goodridge*, include pension benefits, special payments to spouses of firefighters and policemen killed in the line of duty, and joint tenancy-in-common. *Goodridge*, 798 N.E.2d at 955-56. In federal law, similar benefits include the Social Security spousal benefit. 42 U.S.C. § 402 (2004) (old-age and survivors insurance benefit payments). If legislatures crafted these legal provisions as a benefits package in order to help people live their lives together, it is at least a little odd that so many of the visible financial benefits are triggered by the death of the partner or of the marriage.

what marriage is: a "one-flesh" union of husband and wife, and then reasons from the existence of this union to how in justice the law must act if that "one-flesh" union really does exist. In the process, the law helps to make the "one-flesh" union real, requiring the state and other institutions to treat the couple as if their marriage really exists.

Marriage is not a benefits package. One cannot strip the normative from the administrative functions of marriage without making marriage law largely unintelligible. Laws about marriage do not function primarily as an administrative distributor of benefits that help provide incentives to get and stay married, or even help people lead the kind of life they choose. Marriage requires consent, but marriage is not about helping people live any way they choose. The purpose of marriage law is inherently normative, to create and force others to recognize a certain kind of union: permanent, faithful, co-residential, and sexual couplings.

The goal of marriage law, in other words, is not to make two people's lives easier, it is to marry them.

II. WHY MARRIAGE?

The central question raised by the same-sex marriage debate is therefore the question that Koppelman cannot answer: why *this* sanctification narrative and not some other, or no sanctification narrative at all? What right does the government have, and what interests of the state are served by singling out this one kind of relationship for special legal attention? What business is it of the government to sustain or reinforce norms about people's private, intimate lives?

As we've seen, this is a very hard question for advocates of same-sex marriage to answer. Dependency, love, "like it or not people already live like this," none of these can reliably discriminate between the kinds of relationships that are legally defined as marriage and the kinds that, however intrinsically valued and socially important, are legally unregulated.

So what is the answer? Why does marriage exist as a legal institution? What justifies its continued existence?

A. *The historical answer in the American legal tradition*

Historically, the reason marriage exists as a legal institution is clear. A virtually uninterrupted series of both lower court decisions[32] and Supreme

32. *See Dean v. D.C.*, 653 A.2d 307, 337 (D.C. Cir. 1995) (finding that this "central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples") (Ferren, J., concurring and dissenting); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) (observing that a "state has a compelling interest in encouraging and fostering procreation of the race"); *Standhardt v. County of Maricopa ex rel. Jeanes*, 77 P.3d 451, 463-64 (Ariz. App. Div. 1 2003) ("We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."); *Marvin v.*

Court decisions[33] until quite recently affirmed the primary purpose of marriage as a *legal* institution is to manage the sexually-based phenomenon known as "procreation." This is not quite the same as saying "marriage is in order to produce children." Marriage is not a factory for childbearing. Marriage existed to encourage men and women to create the next generation in the right context and simultaneously to discourage the creation of children in other contexts—out of wedlock in fatherless homes.

The reason marriage was singled out for special legal attention is that it is the only human relationship that can both (a) produce the next generation of babies and (b) connect those babies to both their mother and father.

Note that throughout this period, some married couples have not had children and older couples were allowed to marry. Yet legislators, courts, and the public continued to understand marriage's prime purpose as regulating sexual relationships in the interests of managing procreation. They understood that because sexual relationships between men and women outside of marriage regularly give rise to children, "narrowly tailoring" marriage would defeat its core public purpose. When men and women engage in extended sexual careers outside of marriage, pregnancy is the almost invariable result. At any age getting men and women attracted to the opposite sex into stable marital unions was understood to protect the interests of children and society in a stable social order.[34]

Marvin, 557 P.2d 106, 122 (Cal. 1976) (blending the expressive and emotional value of marriage to the individual with its social function: "the structure of society itself largely depends upon the institution of marriage. . . . The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); *Carris v. Carris*, 24 N.J. Eq. 516, 524 (N.J. 1873) ("One of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union.") (quoting *Reynolds v. Reynolds*, 85 Mass. 605, 610 (1862)); *Williams v. Witt*, 235 A.2d 902, 903 (N.J. Super. App. Div. 1967) ("[S]ince procreation is considered to be an essential element of the marriage, there exists an implied promise at the time of the marriage to raise a family. An undisclosed contrary intention, therefore, constitutes a fraud going to an essential of the marriage.").

33. *See e.g. Skinner v. State ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress.").

34. Koppelman raises this argument only in his discussion of the intrinsic value arguments provided by new natural law theorists. Koppleman, *supra* n. 1, at 16-17. The infertility argument is more commonly treated (by the *Goodridge* Court and others) as the ultimate proof either that (a) marriage does not now and never had anything to do with making children, or giving them mothers and fathers, since older couples and infertile couples have always been allowed to marry (this is not really a tenable proposition historically speaking) or more subtly (b) evidence that same-sex marriage won't produce dramatic changes in the meaning of marriage, since marriage as a legal category already includes infertile and older couples who are just like same-sex couples in this important respect.

B. *The cross-cultural answer: Marriage as a universal human institution*

Nor was it only American society that understood marriage in these terms. Marriage is a virtually universal social institution. It by no means always looks like our own particular marriage system, which is deeply rooted in Judeo-Christian-Roman cultural assumptions. But everywhere marriage has something to do with bringing together a man and a woman into a public—not merely private—sexual union, in which the rights and responsibilities of the husband and wife towards each other and any children their sexual union produces are publicly—not privately—defined and enforced.[35]

As twelve family scholars pointed out recently:

> Marriage exists in virtually every known human society. . . . [A]t least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.[36]

Other scholars have written:

> Marriage is a universal social institution, albeit with myriad variations in social and cultural details. A review of the cross-cultural

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There's something odd about this argument. No one until quite recently ever doubted that marriage had some important relationship to procreation, even though older couples and infertile couples were always legally allowed to marry in the United States and most of Western Europe (that I am aware of).

Perhaps this is partly because "infertile couples" are an invisible class (everyone is supposed to start out as a childless couple, and you never know who will eventually have a baby). Perhaps it is partly because even the most fertile of couples eventually gets old. Therefore the existence in the married population of older and/or childless couples has never been held (at least until the rise of the desire to justify same-sex marriage) to contradict the idea, either logically or in actual social practice, that marriage as a social and legal institution has something important to do with bringing together men and women to create the next generation. Such couples do not contradict in any intelligible, visible way, the basic purposes of marriage as a childrearing institution. After all, being an infertile couple may be a prelude to being a fertile couple. Being an older couple is the culminating stage in the lifecycle of younger couples. Moreover, we know for a fact that including these kinds of opposite-sex couples doesn't damage the meaning of marriage as a childrearing institution, because they were included even when marriage's capacity to regulate non-marital births, and encourage procreation, was much stronger than it is now.

35. The small number of exceptions are polygamous tribal societies in which a small number of individuals were permitted to change their social gender (such as the North American Indian *berdache*) and therefore enter marriages, or one tribe in West Africa (the Igbo) in which barren wealthy women were allowed to function as husbands, taking provisioning responsibility for female wives and their children.

36. William J. Doherty et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* 8-9 (Inst. for Am. Values 2002).

> diversity in marital arrangements reveals certain common themes: some degree of mutual obligation between husband and wife, a right of sexual access (often but not necessarily exclusive), an expectation that the relationships will persist (although not necessarily for a lifetime), some cooperative investment in offspring, and some sort of recognition of the status of the couple's children. The marital alliance is fundamentally a reproductive alliance.[37]

I am not arguing that simply because marriage has always been about this it cannot ever be changed. That would be un-American. The question is: Why do so many wildly different kinds of societies come up with some version of marriage? There are not that many universal human social institutions. What is it about human nature that leads culturally separate and distinct societies to independently come up with the same basic idea?

Here is what I think the answer is: Marriage as a universal social institution is grounded in certain universal features of human nature. When men and women have sex, they make babies. Reproduction may be optional for individuals, but it is not optional for societies. Societies that fail to have "enough" babies fail to survive. And babies are most likely to grow to functioning adulthood when they have the care and attention of both their mother and their father.

Marriage arises again and again in some form out of the basic human need for a social institution to manage these basic human sexual realities. Societies that fail to manage these realities fail to survive long enough to be recorded by anthropologists among the human alternatives.

C. *Does this marriage idea still matter? Contemporary evidence from the social sciences*

Sex makes babies. Society needs babies. Babies deserve mothers and fathers. Together these three ideas explain the public purposes of marriage, its shape and its form. Marriage intrinsically aims at an enduring, exclusive, sexual union between a man and a woman, because managing the procreative consequences of human sexual attraction is at the core of its reason for existence.

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37. Margo Wilson & Martin Daly, *Marital Cooperation and Conflict*, in *Evolutionary Psychology, Public Policy and Personal Decisions* 197, 203 (Charles Crawford & Catherine Salmon eds., Lawrence Erlbaum Assoc. 2004) (cited in Daniel Cere, *War of the Ring*, in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* 9, 24 (Daniel Cere & Douglas Farrow eds., McGill-Queen's U. Press 2004) [hereinafter *Divorcing Marriage*]); *see also* Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *Divorcing Marriage*, *supra* 41, 45 ("Comparative research on the worldviews of both small-scale societies and those of world religions, both Western and Eastern, reveals a pattern: Marriage has universal, nearly universal, and variable features. Its *universal* features include the fact that marriage is (a) supported by authority and incentives; (b) recognizes the interdependence of men and women; (c) has a public, or communal, dimension; (d) defines eligible partners; (e) encourages procreation under specific conditions; and (f) provides mutual support not only between men and women, but also between them and children.").

Notice that all three of the components of the marriage idea are now contested in the public square. So the question arises: Is each of these three core marriage propositions still true? Do we still need a legal and social institution whose purpose is to manage the procreative consequences of sexual attraction between men and women, or have we transcended this great, historic, cross-cultural universal human imperative through technology or other means?

1. Does sex make babies?

Forty years after *Griswold v. Connecticut*,[38] we now have considerable social experience testing these propositions. Does sex still make babies? Yes. Sex between men and women continues to make babies on a regular basis, with or without the conscious intention of the participants. The longer men and women engage in non-marital sexual careers, the greater the risk of a non-marital pregnancy. Despite legal contraception, numerous studies have shown that unintended pregnancy is the common, not rare, consequence of sexual relationships between men and women.

By their late thirties, 60 percent of American women had had at least one unintended pregnancy.[39] Almost 4 in 10 women aged 40-44 had had at least one unplanned birth.[40]

Similarly, a scholarly analysis of contraceptive failure rates in actual use concluded, "almost half of all pregnancies were unintended in 1994. Some 53 percent of these occurred among women who were using contraceptives."[41]

Another analysis of the 1995 National Survey of Family Growth concluded:

> The risk of failure during typical use of reversible contraceptives in the United States is not low—overall, 9% of women become pregnant within one year of starting use. The typical woman who uses reversible methods of contraception continuously from her 15th to her 45th birthday will experience 1.8 contraceptive failures.[42]

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38. 381 U.S. 479 (1965).

39. Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 Fam. Plan. Perspectives 24, 28 (Table 3) (1998) (finding 60.0% of women aged 35-39 had had at least one unintended pregnancy).

40. *Id.* (finding 38.1% of women aged 40-44 had had at least one unplanned birth).

41. Haishan Fu et al., *Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth*, 31 Fam. Plan. Perspectives 56, 56 (1999).

42. James Trussell & Barbara Vaughan, *Contraceptive Failure, Method-Related Discontinuation and Resumption of Use: Results from the 1995 National Survey of Family Growth*, 31 Fam. Plan. Perspectives 64, 71 (1999).

The typical woman who uses contraceptives continuously will experience almost two unintended pregnancies.[43] Contraceptive technology lowers the odds of pregnancy, but never eliminates the risk, especially for people who engage in extended non-marital sexual careers. The existence of contraceptives does not eliminate the state's interest in preferring voluntary marital sexual unions between men and women to other kinds. *Virtually every child born to a married couple will have a mother and a father already committed to caring for him or her. Most children conceived in sexual unions outside of marriage will not.*

2. Does society need babies?

The second historic purpose of marriage is to encourage men and women to make the next generation. Does society still need babies? The experience of most of the developed nations of the world makes clear that depopulation, not overpopulation, is the threat most to be feared in the contemporary context. America is one of the only developed nations that has birthrates even close to levels necessary to prevent steep depopulation.

Europe's total fertility rate (TFR) from 1995 to 2000 was 1.42 children per woman.[44] (Demographers define "very low fertility" as a birthrate below 1.5 children.[45])

What are the consequences of these very low levels of procreation? At the April 2, 2004 meeting the Population Association of America, U.N. demographer Joseph Chamie warned,

> [a] growing number of countries view their low birth rates with the resulting population decline and ageing to be a serious crisis, jeopardizing the basic foundations of the nation and threatening its survival. Economic growth and vitality, defense, and pensions and health care for the elderly, for example, are all areas of major concern.[46]

A paper presented at one recent United Nations conference indicates that fertility levels of 1.5 to 1.8 children per woman constitute a "[s]trong dearth calling for deep revision of population policy . . . . [H]igher risk of

43. *Id.* ("These high pregnancy rates do not reflect the inherent efficacy of methods when used correctly and consistently . . . but instead reflect imperfect use (because most reversible methods are difficult to use correctly).").

44. United Nations Population Division, *World Population Prospects: The 2002 Revision Highlights* 4, http://www.un.org/esa/population/publications/wpp2002/WPP2002-HIGHLIGHT-Srev1.PDF (February 26, 2003). North America, by contrast, has near-replacement level fertility at 2.01 children per woman. *Id.*

45. John C. Caldwell & Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, 57 Population Stud. 241, 241 (2003). "Lowest low fertility" is often defined as a total fertility rate of 1.3 or less. Hans-Peter Kohler et al., *The Emergence of Lowest-Low Fertility in Europe During the 1990's*, 28 Population & Dev. Rev. 641, 642 (2002).

46. Joseph Chamie, *Low Fertility: Can Governments Make a Difference?* 2, http://paa2004.princeton.edu/download.asp?submissionId=42278 (Apr. 2, 2004).

labour shortage and reduced capacity to integrate new immigrants; since the main engine of integration of foreigners is the school, this integration cannot happen if a minimal fertility is not realized among the resident population."[47]

As fertility levels fall to 1.2 to 1.5 children per woman (the European average), the result is "[h]eavy and structural contraction, which digs a deep hole at the [base] of the age pyramid and consequently compromises the future of the society at large. . . . [T]he resident population is progressively replaced by a continuous and bulky inflow of immigrants."[48]

As fertility falls to less than 1.2 children per woman, as in Spain and Italy, the situation becomes an

> [e]xtreme case that is less and less rare, namely in Southern Europe and in the former Eastern bloc. A severe amputation of the base of the age pyramid is taking place under our eyes. . . . Acute and rapid aging process; deep and longlasting migratory dependency that could be unbearable or unmanageable.[49]

The familiar population explosion is replaced by a population implosion or "exponential decrease."[50] Financial consequences include "[t]he growing transfer of resources for the elderly (pension and health costs) to the detriment of younger workers," which can create a "feedback effect, creating a disincentive to fertility."[51]

Far from making marriage obsolete as a regulator of childbearing, widespread contraceptive and abortion rights may actually make more salient, not less, the traditional role of marriage in encouraging men and women to make the next generation that society needs.

High birth rates may not be better than lower birth rates; but societies that fail to reproduce do not survive. Every society needs an institution that encourages men and women to have children if they want them.

The more legal, cultural, and technological choice individuals have about whether or not to have children, the more need there is for a social institution that encourages men and women to have babies together, and that creates the conditions under which those children are likely to flourish.

3. Do moms and dads matter?

By making marriage a permanent sexual union based on the fidelity of both spouses, the state seeks to increase the likelihood that children will be raised in "intact" families, cared for by their mother and father. State pref-

47. Jean-Claude Chesnais, *The Inversion of the Age Pyramid and the Future Population Decline in France: Implications and Policy Responses* 3, http://www.un.org/esa/population/publications/popdecline/Chesnais.pdf (Aug. 15, 2000).

48. *Id.*

49. *Id.*

50. *Id.* at 2.

51. *Id.* at 8.

erences for marriage over other kinds of unions transmit a clear message to the next generation: the man and the woman who make the baby are supposed to stick around, take care of each other and their baby too.

Many scholars have written extensively on the social science evidence of the importance of intact, married biological parents.[52] A *Child Trends* research brief summed up the scholarly consensus on the family structures that have been well-studied to date:[53]

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.[54]

These benefits, it should be noted, are not the results of specific legal incentives to parents or partners. Children whose single mothers remarry, for example, do not do any better on average than children whose mothers remain single.[55] The primary way that legal marriage protects child well-

52. Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (Doubleday 2000); Gallagher & Baker, *Do Moms and Dads Matter?*, *supra* n. 4; Gallagher, *Rites, Rights, and Social Institutions*, *supra* n. 4; Maggie Gallagher, *What is Marriage For?*, *supra* n. 4; Maggie Gallagher & Joshua K. Baker, *Do Mothers and Fathers Matter?: The Social Science Evidence on Marriage and Child Well-Being*, http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf (Feb. 27, 2004); *see also* Paul R. Amato & Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* (Harvard U. Press 1997); Doherty et al., *supra* n. 36, at 6; Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* (Harvard U. Press 1994); Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, http://www.childtrends.org/files/marriageRB602.pdf (June 2002); Coalition for Marriage, Fam. and Couples Educ. et al., *The Marriage Movement: A Statement of Principles*, http://www.marriagemovement.org/pdfs/The%20Marriage%20Movement-A%20Statement%20of%20Principles.pdf (2000).

53. This does not include children raised in households headed by two same-gender parents. The majority of studies of gay parenting have compared children of single lesbian mothers to children of single heterosexual mothers. To date there are no studies of children raised in same-sex households based on nationally representative data. For a review of the literature on same-gender parenting, *see* Aff. of Stephen Lowell Nock, *Halpern v. Atty. Gen. of Canada*, [2001] Ont. Sup. Ct. of Just. (Div. Ct.), Ct. File No. 684/00; Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* (Marriage Law Project 2001); Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 Developmental Psychol. 130 (1995); Gallagher & Baker, *Do Moms and Dads Matter?*, *supra* n. 4. In addition, Judith Stacey and Timothy Biblarz, while generally supportive of same-sex parenting, acknowledge important methodological limitations in existing research. For example, the authors acknowledge that "there are no studies of child development based on random, representative samples of [same-sex couple headed] families." Judith Stacey & Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 Am. Sociological Rev. 159, 166 (2001).

54. Moore et al., *supra* n. 52.

55. For example: "In general, compared with children living with both their parents, young people from disrupted families are more likely to drop out of high school, and young women from

being, social science suggests, is by increasing the likelihood that the child's own mother and father will stay together in a harmonious household.

While scholars continue to disagree about the size of the marital advantage and the mechanisms by which it is conferred,[56] the weight of social science evidence strongly supports the idea that family structure matters and that children do best when raised by their own mother and father in a decent, loving marriage.

III. How does marriage law matter?

Laws do more than incentivize or punish, as Mary Ann Glendon has pointed out.[57] They educate directly and indirectly. They define the boundaries of organizations, institutions, and relationships in the public square. One of the most basic ways that the law of marriage helps regulate out-of-wedlock births, for example, is by defining a socially shared category of married births, without which the very idea of unmarried childbearing disappears.

If we cannot tell who is married, we cannot tell who is an unwed parent. We therefore cannot, in any shared public fashion, teach our children that it is best to wait until marriage before risking pregnancy. If we cannot tell who is married, we cannot tell who is committing adultery, either.

Thus one of the core ways the law of marriage protects marriage as a shared social institution is by defining its boundaries: clearly marked entry and clearly marked exits mean that the category of marriage is sharply defined and contrasted with non-marriage.

By requiring a divorce, we clearly communicate that leaving a marriage is not just a private matter, a question of taste, like other love relationships. Marriage law helps sustain the core public (as opposed to private or sectarian) understandings of what marriage is and what purposes it serves.

The most important legal purpose of defining marriage is to communicate to the young the essential, broad characteristics of the normative (or ideal) sexual union. Marriage law actively reflects and communicates shared norms about marriage, and these allow marriage to function as a

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one-parent families are more likely to become teen mothers, irrespective of the conditions under which they began to live with single mothers and irrespective of whether their mothers remarry or experience subsequent disruptions." McLanahan & Sandefur, *supra* n. 52.

56. *See e.g.* E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (W. W. Norton & Co. 2002).

57. Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* 7-8 (Harv. U. Press 1987). Glendon notes, for example: "In England and the United States the view that law is no more or less than a command backed up by organized coercion has been widely accepted. The idea that law might be educational, either in purpose or technique, is not popular among us. . . . [L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things. It is 'part of the distinctive manner of imagining the real.'" *Id.*

social institution, changing the behavior of men and women in ways that benefit not only them, but their children and the larger community.[58]

To summarize the argument so far: Marriage law is important not because it distributes administrative benefits that help people live their private lives. The law of marriage serves the "sanctification narrative," sustaining the boundaries of marriage and the basic norms required of married people. The reason the state is justified in "imposing" such norms on people's intimate lives, is that sex makes babies, societies need babies, and children deserve their own mothers and fathers. While marriage and children are optional for individuals, they are not for societies. Managing the sexually-based phenomenon known as "procreativity" is not optional, but essential if a civilization is to perpetuate itself over the long term. At least it has been in every known human society and (the evidence suggests) still is in our own.

IV. How will same-sex marriage weaken marriage as a social institution?: Some general concerns

How will redefining marriage as a unisex institution affect marriage? Let me lay out some general concerns.

A. *Change the public meaning of "marriage"*

Social institutions, as Dan Cere has pointed out, are essentially "public markers of social meaning."[59] They aren't simple, solid things. They consist largely of interlocking sets of ideas that regulate or affect the way people actually behave and the way they understand their relationships with others. "Meaning matters, and the institutions that bear it serve to structure our experiences and to steer them in a particular direction. They define our goals, focus attention on those goals, and direct us toward them."[60] Similarly, Barbara Dafoe Whitehead pointed out the power of words as markers of shared meaning in a 1992 essay (on a different subject), "The Experts' Story of Marriage":

> [T]he marriage critics seek to devalorize marriage by stripping away its inherited mantle of meaning and by erasing the linguistic boundaries between marriage and non-marriage. This amounts to cultural hardball. For language—or more precisely, normative vocabulary—is one of the key cultural resources supporting and regulating any institution. Nothing is more essential to the integ-

58. *See* Gallagher, *Rites, Rights, and Social Institutions*, *supra* n. 4; Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992); Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. Chi. Legal F. 225 (2004); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901 (2000).

59. Cere, *supra* n. 37, at 15.

60. *Id.*

> rity and strength of an institution than a common set of understandings, a shared body of opinion, about the meaning and purpose of the institution. And, conversely, nothing is more damaging to the integrity of an institution than an attack on this common set of understanding with the consequent fracturing of meaning.[61]

Change the public meaning of a social institution, and you change the institution itself. As a matter of definition, if you widen the class of objects to which a category applies, you necessarily make the fit between the category and the object less tight.

How can we translate this general intellectual insight into specific terms that critics like Prof. Koppelman can perceive (if not necessarily agree with)?

Put it this way: Words, like social institutions, have no fixed meanings. There is no reason in the world why we—or the law—cannot redefine "cat" to mean "furry, domestic animal with four legs and a tail." Defining "cat" in this way has certain advantages. It reveals the deep underlying similarities for example between those two formerly opposite classifications: "dog" and "cat." Not to mention "gerbil," "rabbit," and "guinea pig."

What is lost in redefining "cat" in this way?

Well, there is one little thing: we now no longer have a word that means "cat." If we want to speak to each other about cats, we will either have to invent a new term, and hope it will still communicate the full valence of the old word (rich with historic associations and symbolic overtones), or we will have to do without a word for "cat" at all. One might reasonably foresee, without charting all the particular specific mechanisms, that it might become harder to communicate an idea for which we no longer have any word.

Instinct doesn't take human beings very far. Social institutions like marriage are created, sustained, and transmitted by words, and the images, symbols, and feelings, that surround words. Change the meaning of the word, and you change the thing itself.

One thing same-sex marriage indubitably does is displace certain formerly core public understandings about marriage: such as, that it has something to do with bringing together male and female, men with women, husbands and wives, mothers with fathers. Husband will no longer point to or imply wife. Mother no longer implies father.

Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage.

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61. Barbara Dafoe Whitehead, *The Experts' Story of Marriage* 7 (A Council on Families in America Working Paper for the Marriage in America Symposium, Working Paper No. WP14, 1992).

As Ladelle McWhorter acknowledged: "[Heterosexuals] are right, for example, that if same-sex couples get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well."[62]

B. The legal "misfit": some specific concerns

What is true for the word itself is also true for the underlying legal apparatus. As the legal category of marriage is broadened to include both same- and opposite-sex couples, the fit between the legal forms of marriage and the thing being regulated will also become less good. This is a necessity of widening the definition of a legal class, widely understood in other contexts.

To see what I mean by this, take another look at the *San Francisco Chronicle* story. Patricia Robertson says registering as a marriage-like couple:

> may not be the most prudent decision for everyone. . . . Gay and lesbian relationships have not been as financially intertwined as marriage historically, which was traditionally structured on the basis that women were the property of men. . . . For a lot of LGBT (lesbian, gay, bisexual and transgender) people, being independent financially is an important part of who they are. . . . To be told by the law that their financial relationship is now expected to mimic that of a married couple is unknown territory.[63]

The rules for marriage are continually revised and updated, but they are deeply grounded in assumptions that have arisen from experience in managing opposite-sex relationships.

Rules assuming financial obligations of spouses, for example, stem from the deep economic vulnerabilities imposed on women by pregnancy and childbearing. Even today, women with children cannot compete as effectively in the marketplace (on average) as childless women or men, and unwed mothers face the most serious economic risks of all.[64]

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62. Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (Indiana U. Press 1999) (cited in Cere, *supra* n. 37, at 14).

63. Marech, *supra* n. 23.

64. Working women pay a "motherhood penalty." Waite & Gallagher, *supra* n. 52, at 107-08; *see also* Sara McLanahan, *Family, State, and Child Well-Being*, 26 Annual Rev. Sociology 703, 705 (2000); Isabel V. Sawhill, *Families at Risk*, in *Setting National Priorities: The 2000 Election and Beyond* 97 (Henrey J. Aaron & Robert D. Reischauer eds., Brookings Instn. Press 1999). A 1999 study found that 81 percent of children raised in non-marital households will experience poverty as a child, compared to just 22 percent of children raised by married parents. Mark R. Rank & Thomas A. Hirschl, *The Economic Risk of Childhood in America: Estimating the Probability of Poverty Across the Formative Years*, 61 J. Marriage & Fam. 1058, 1064 (1999) (cited in Doherty et al., *supra* n. 36, at 21-22).

Rules against adultery, for example (still on the books in 24 states[65]) may not make sense for gay men, who at least some preliminary evidence suggests[66] are more likely to stay together if they are NOT sexually exclusive and do not create nonmarital children when they have sex with other men. Either the rules/norms/values for sustaining permanent opposite-sex coupledom will be imposed on gay couples (who will chafe at the bad fit around the corners)[67] or the rules will be expanded and redrawn at a more general level of unisex specificity that will make marriage as a legal form "fit" opposite-sex coupledom less well.

The latter is what the Ontario Court of Appeals explicitly demanded: that the legal and public meaning of marriage be revised to take into account the "needs, capacities and circumstances of same-sex couples, not . . . the needs, capacities and circumstances of opposite-sex couples."[68] Many advocates for gay marriage, for example, now question the "rule of two" limiting marriage and its associated benefits to faithful couples, in part because of dramatic differences in how same-sex couples "generate" children. Right after *Goodridge*, two members of the board of the National Gay and Lesbian Law Association warned of the dangers of accepting the "primacy" of the "married, two-parent model":

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65. *See* Ala. Code § 13A-13-2 (1996); Ariz. Rev. Stat. Ann. § 13-1408 (West 2001); Colo. Rev. Stat. Ann. § 18-6-501 (West 2004); Fla. Stat. Ann. § 798.01 (West 2000) (criminalizing open adultery); Ga. Code Ann. § 16-6-19 (2003); Idaho Code § 18-6601 (1997); 720 Ill. Comp. Stat. Ann. 5/11-7 (West 2002) (criminalizing adultery if open and notorious); Kan. Stat. Ann. § 21-3507 (West 1971 & Supp. 2004); Md. Crim. L. Code Ann. § 10-501 (2002); Mass. Ann. Laws ch. 272, § 14 (Lexis 1992); Mich. Comp. Laws Ann. § 750.30 (West 2004); Minn. Stat. Ann. § 609.36 (West 2003); Miss. Code Ann. § 97-29-1 (2000) (criminalizing habitual adultery); N.H. Rev. Stat. Ann. § 645:3 (1996); N.Y. Penal Law § 255.17 (McKinney 2000); N.C. Gen. Stat. § 14-184 (2003) (criminalizing adultery when lewd and lascivious cohabitation occurs); N.D. Cent. Code § 12.1-20-09 (1997); Okla. Stat. Ann. tit. 21, § 871 (West 2002); R.I. Gen. Laws § 11-6-2 (2002); S.C. Code Ann. § 16-15-60 (2003) (criminalizing adultery when cohabitation or habitual intercourse are present); Utah Code Ann. § 76-7-103 (2003); Va. Code Ann. § 18.2-365 (2004); W. Va. Code § 61-8-3 (2000); Wis. Stat. Ann. § 944.16 (West 1996 & Supp. 2004).

66. A preliminary 1984 study suggested that gay men are more likely to stay together if they are not sexually exclusive. David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 285 (Prentice-Hall, Inc. 1984). Evidence of a preference for non-monogamous relationships among some gay men who are partners is considerable, although how common or uncommon these are among gay couples in general is in dispute. *See e.g.* Philip Blumstein & Pepper Schwartz, *American Couples: Money, Work, Sex* (William Morrow & Co., Inc. 1983); Mara Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection among Homosexual Men in Amsterdam*, 17 AIDS 1029 (2003).

67. For example: "LGBT families often can be more complex than the model of traditional mixed-sex marriage. Consider the pair of lesbian co-parents who wish to involve their child's biological father in their child's upbringing without affirming his paternity rights. . . . Thus, to the extent that the availability of same-sex marriage may result in a reduction of recognition for diverse forms of partnership and households, LGBT families that do not fit the traditional marriage model may not benefit and may even be harmed." Suffredini & Findley, *supra* n. 5, at 613-14.

68. *Halpern v. Toronto*, [2003] 65 O.R.3d 161 at ¶ 91 (cited in Cere, *supra* n. 37, at 14).

> [S]ome same-sex couples may desire recognition of multiparty relationships. For example a same-sex couple who have a child with a known sperm donor [sic] or surrogate mother may wish to form a three-party relationship, with each party having recognized rights vis-a-vis the other parties and the child. Alternatively, a bisexual individual may wish to maintain a co-parenting relationship with a former partner even after each has formed a new primary relationship. Some LGBT individual may form polyamorous or ethically nonmonogamous relationships. . . . [I]t is therefore important to remain mindful of the diversity of real partnerships and households, and to engage critically the primacy of the married, two-parent model.[69]

Or consider, to give another related suggestive example, the fit between the same-sex marriage and the "presumption of paternity," which is the legal presumption that the husband is the father of the wife's children. Traditionally, no one else has standing under the law to challenge the husband's claim to be the legal father of his wife's children if he asserts it—not even the wife.[70] The law will automatically impose the legal obligation of paternity on the husband, unless he contests it on the grounds the children are not biologically his.[71] The presumption of paternity is thus rooted in fused biological and social reality. In having sex with his wife, the husband assumes the risks of paternity. In promising sexual exclusivity to the husband, the wife accepts his right to claim her children as his own. The presumption of paternity accords not only with biological reality but with social reality as well: It is marriage to the mother that creates effective social fatherhood for most men. Outside of marriage to the mother of their child, only a minority of men remain effective fathers in their children's lives.[72]

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69. Suffredini & Findley, *supra* n. 5, at 605.

70. *See e.g.* 14 C.J.S. *Children Out-of-Wedlock* § 30 (1991) (describing the different approaches adopted in various jurisdictions); *Gossett v. Ullendorff*, 154 So. 177, 181 (Fla. 1934) ("[A] wife is not permitted to deny the parentage of children born during wedlock. She cannot repudiate their legitimacy. That right belongs only to the father, because maternity is never uncertain."); *Eldridge v. Eldridge*, 16 So. 2d 163, 163 (Fla. 1944) ("Where a child is born in wedlock the law extends the right to the reputed father, to contest the parentage, but the mother has no such right."); *Phillips v. Phillips*, 467 So. 2d 132, 134 (La. App. 3rd Cir. 1985) ("On prior occasions the presumption of legitimacy accorded a child born during the existence of a marriage has been declared one of the strongest presumptions known to law. Indeed, the presumption is so strong and conclusive, even the mother is precluded from stigmatizing such a child as illegitimate by contending her lawful husband is not the child's father.").

71. 14 C.J.S. *Children Out-of-Wedlock* §§ 13, 14 (1991) (Section 13 states: "It is the policy of the law to favor the legitimacy of children and to declare them legitimate if it may be fairly done, and a child is presumed to be legitimate until the contrary is shown.").

72. Studies show that two out of three children born out of wedlock have nonresident fathers at birth. This percentage climbs as children grow older (though some couples eventually marry). *See e.g.* Sara McLanahan et al., *Unwed Fathers and Fragile Families* 7 (Ctr. for Research on Child Wellbeing Working Paper No. 98-12, 1998). An Urban Institute policy brief explains the impact: "Parents who do not live with their children are unlikely to be highly involved in their

The *Goodridge* court listed the presumption of paternity as one of the prime benefits of marriage. Except that in order to make the presumption "fit" the new paradigm of unisex marriage, it transformed the traditional presumption of paternity into something entirely new, called a presumption of "parentage."[73]

What will the presumption of parentage do? Well, no one knows exactly, as this is uncharted legal ground. But presumably the law will now grant a lesbian partner the status of co-parent of any children her spouse bears. Presumably it will apply as well to a gay man who has children with a surrogate mother, or when one man adopts a child. If one husband becomes a father, the other will be a father, too.

Immediately, however, one can see problems even with this adaptation of the presumption of paternity to a unisex right. First, there is the problem of "too many" parents. What happens to the parental rights of the other biological parent under the presumption of parentage? Then there is the problem of consent to parenthood (particularly acute in a system which elevates decisions about whether or not to have children into a constitutional right[74]). Unlike heterosexual couples, who are presumed to consent to coparenting by having marital sex, spouses in same-sex marriages will be able to impose parental obligations on their spouse without any expression of consent on their part at all. Either that, or the "presumption of parentage" in the law will now be contestable, not because the spouse is not the biological parent, but because the spouse did not consent to the child. Can these new grounds for contesting parenthood be limited only to same-sex couples? Or will all men (thanks to the new presumption of parentage) have a new legal standing to reject the obligations of fatherhood on the grounds they only consented to sex and not to parenthood?

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children's lives." Elaine Sorensen & Chava Zibman, *To What Extent Do Children Benefit from Child Support?* 3, http://www.urban.org/UploadedPDF/discussion99-19.pdf (January 2000). According to the National Survey of America's Families, one in three (34%) children with a nonresident parent saw that parent on a weekly basis in 1997. Another 38 percent saw their nonresident parent at least once during the year, though not on a weekly basis. Fully 28 percent of children with a nonresident parent had *no* contact with that parent during the course of the year. *Id.* Another review of several national surveys found that, by their mothers' estimates, roughly 40 percent of children with nonresident fathers saw their father once a month, while nearly the same number did not see their father at all in a given year. Wendy D. Manning & Pamela J. Smock, *New Families and Non-Resident Father-Child Visitation*, 78 Soc. F. 87, 89 (1999). *See also* Valerie King, *Variations in the Consequences of Nonresident Father Involvement for Children's Well-Being*, 56 J. Marriage & Fam. 963, 966 (1994) (finding half of children with nonresident fathers see their fathers only once a year, if at all, while just 21 percent see their fathers on a weekly basis).

73. 798 N.E.2d at 956.

74. *See e.g. Zablocki v. Redhail*, 434 U.S. 374 (1978) (describing right to marry as incident to right of procreation); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abort an unborn child prior to viability); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to contraceptive use by unmarried persons); *Griswold v. Conn.*, 381 U.S. 479 (1965) (right to contraceptive use by married couples).

Either the legal incidents of marriage will be designed around opposite-sex sexual reality, or they will be designed around the allegedly more generic "gender neutral" same-sex sexual reality. In either case, one of the two groups is going to find the "fit" between the legal form and the relationship being regulated is not as good.

If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea. Particularly since the class of people to be benefited is so small,[75] and alternative mechanisms for meeting their social needs (ones perhaps even better designed for them than marriage) have hardly been seriously tried, much less exhausted.

C. The refusal to seriously engage the risk

To all the rich reasons we might have for viewing the redefinition of marriage with deep concern, Koppelman offers only one real response: "It's hard to imagine how legal recognition of same-sex marriage would affect even one father's deliberations about whether to stay with his children. . . . I have three kids, and I don't think I stick around because I'm mystified or confused."[76] This is a soundbite, not a serious thought. It amounts to a rejection of the idea that the social meanings encoded in law matter. The law interacts only by directly punishing or directly benefiting free and disparate individuals. The law is an administrator alone. Its ideas do not have any consequences.

I think it is hard for any serious legal scholar to consistently sustain such an impoverished vision of the law's potency, certainly not an intelligent scholar such as Koppelman himself. Notice, when the subject becomes civil unions, Koppelman does a radical about-shift in his understanding of how and why the law matters. Here, all his talk about the multiple meanings of law individually determined and changing randomly over time in ways impossible to predict as the meaning of social institutions change suddenly vanishes. He shows little doubt about what the public meaning of a separate civil unions system for same-sex couples will be: "Separate but equal has an unattractive history."[77]

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75. According to the 2000 Census there are 162,000 households in America consisting of a same-sex partner with a child under 18 in the household; 430,000 households consisting of same-sex partners without children. U.S. Dept. of Commerce, *Census 2000 Spec. Rpt.: Married-Couple and Unmarried Partner Households* tbl. 2, 11 (Feb. 2003). Meanwhile 15 million children live in fatherless homes. U.S. Dept. of Commerce, *Census 2000 Spec. Rpt.: Children and the Households They Live In* tbl. 6 (Feb. 2004). There are 24.8 million married couples with children and 54.5 million opposite-sex married couples. *Id.* at tbl. 2, tbl. 4.

76. Koppelman, *supra* n. 1, at 30.

77. *Id.* at 15.

When the question becomes the public message sent by reserving marriage to opposite-sex couples, Koppelman recovers his capacity to recognize that social institutions matter, that they send messages that affect the way people think, act, and behave, and indeed experience their own relationships.

The *Goodridge* court itself acknowledged the primacy of this underlying normative or "sanctification" narrative (which the state legislature did not and cannot create on its own) over marriage-as-administrative-benefits-package at least twice: when it rejected the state legislatures' attempt to create a full civil unions alternative (civil unions "foster[ ] a stigma of exclusion . . . deny[ing] to same-sex 'spouses' only a status that is specially recognized in society")[78] and in *Goodridge* itself, when Justice Greaney, in his concurring opinion instructed the good people of Massachusetts not only what they must do (obey the new marriage law), but how they should feel about it:

> I am hopeful our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court's authority to adjudicate the matter. . . . We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do. The union of two people contemplated by G.L. c. 207 is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Because of the terms of art. 1, the plaintiffs will no longer be excluded from that association.[79]

Same-sex marriage in Massachusetts is not merely about opening a new set of legal benefits to more individuals. It is an attempt by the court to create a new sanctification narrative about gay people, by transferring the marriage sanctification narrative to same-sex couples. Unfortunately, because same-sex couples and opposite-sex couples are in fact different, the court can only do so by simultaneously changing the "sanctification narrative" surrounding marriage. The meaning of marriage itself must change if the sanctification narrative about gays and lesbians is to be successful, that

78. *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (2004).

79. 798 N.E.2d at 973-74.

is if citizens are to believe that both same- and opposite-sex married couples are both really equally married.

D. The meaning of same-sex marriage

What must go?

What must go is the one great, big fact about sexual unions between men and women, the big fact that colors many other aspects of intimate relations between men and women: when men and women have sex, they sometimes make babies. The procreative potential of sexual unions must be reduced from the great, brute, obvious, important fact it has been through most of human history, to a minor, not very significant feature of human relationships, largely unrelated to any key purpose of marriage. In the process, the idea that mothers and fathers are the norm for children must also go.

How do I know this is true?

1. What same-sex marriage advocates say

First consider what major advocates for same-sex marriage have said about the purpose of marriage.

William Eskridge argues that procreation is relatively unimportant to marriage, to people, and to society:

> Post-Freudian society understands sexual expression as an important goal of personhood, the modern liberal state guarantees its citizens substantial liberty to make choices about their own sexuality, and an earth that struggles to feed its existing population is not an earth that should overemphasize procreation. Procreation is good and important, but procreation is no longer central to either relationships or to social welfare.[80]

Again, "[i]n today's society the importance of marriage is relational and not procreational."[81]

E.J. Graff understands the power of marriage as a social institution to influence how people think and behave, and the transforming power of same-sex marriage.

> Marriage is an institution that towers on our social horizon, defining how we think about one another, formalizing contact with our families, neighborhoods, employers, insurers, hospitals, governments. Allowing two people of the same sex to marry shifts that institution's message. . . . If same-sex marriage becomes legal,

80. William N. Eskridge, Jr., *The Case for Same Sex Marriage: From Sexual Liberty to Civilized Commitment* 98 (Free Press 1996).

81. *Id.* at 11.

> that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers.[82]

Same-sex marriage, she argues, "does more than just fit; it announces that marriage has changed shape."[83]

Andrew Sullivan:

> Because marriage is such a central institution in so many people's lives, because it forms such an integral part of our own self-understanding, any change in it opens up a host of questions about what the union of two people means, what it has become, and what it could stand for—for everybody. . . . It is at moments like this that we realize that marriage itself has changed. . . . From being a means to bringing up children, it has become primarily a way in which two adults affirm their emotional commitment to one another.[84]

Jonathan Rauch argues that the essential purpose of marriage is to provide *adults* with caregivers:

> I hope I won't be accused of saying that children are a trivial reason for marriage. They just cannot be the only reason. . . . There is a lot of intellectual work to be done to sort the essential from the inessential purposes of marriage. It seems to me, however, the two strongest candidates are these: settling the young, particularly young men; and providing reliable caregivers. Both purposes are critical to the functioning of a humane, stable society, and both are better served by marriage—that is, by one-to-one lifelong commitment—than by any other institution.[85]

Mark Strasser downgrades both the importance of procreation and its relationship to marriage, and the significance of family structure:

> In *Skinner*, the Court held that '[m]arriage and procreation are fundamental to the very existence and survival of the race.' Yet there is no reason to think that the very existence and survival of the human race should or will rest on the shoulders of only those individuals who are raised by *both* of their biological parents. Otherwise, the human race would be in great danger indeed, given the number of individuals raised by single parents or by two parents, at least one of whom is not biologically related to the child.[86]

Evan Wolfson:

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82. E.J. Graff, *Retying the Knot*, in *Same-Sex Marriage: Pro and Con: A Reader* 134, 135-36 (Andrew Sullivan ed., 1st ed., Vintage Books 1997).

83. *Id.* at 137.

84. Andrew Sullivan, *Introduction*, in *Same-Sex Marriage: Pro and Con: A Reader*, *supra* n. 82, at xix.

85. Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good For America* 18 (Times Books 2004).

86. Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* 60 (Cornell U. Press 1997) (internal citation omitted).

> [T]here is no evidence to support the offensive proposition that only one size of family must fit all. Most studies—including ones that [Maggie] Gallagher relies on—reflect the common sense that what counts is not the family structure, but the quality of dedication, commitment, self-sacrifice, and love in the household.[87]

Judith Stacey, who testified before Congress that social science evidence showed "what places children at risk is not fatherlessness, but the absence of economic and social resources that a qualified second parent can provide, whether male or female,"[88] also speculated with approval on the likelihood that gay marriage would inaugurate a new, more expansive embrace of family diversity:

> Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and politics of family life in the United States, helping to supplant the destructive sanctity of *The Family* with respect for diverse and vibrant *families*. . . . Subjecting the conjugal institution to this sort of heightened democratic scrutiny could help it to assume varied, creative and adaptive contours. If we begin to value the meaning and quality of intimate bonds over their customary forms, people might devise marriage and kinship patterns to serve diverse needs. . . . Two friends might decide to "marry" without basing their bond on erotic or romantic attachment. . . . Or, more radical still, perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance, and labor. After all, if it is true that "The Two-Parent Family is Better" than a single-parent family, as family-values crusaders proclaim, might not three-, four-, or more-parent families be better yet, as many utopian communards have long believed?[89]

If same-sex marriage were merely a benefits package, I can imagine some advocates who might argue,

> [Y]es, children need moms and dads in general, and we don't want to disturb that social norm. But we can't do that for our kids and what we do is a pretty good second-best, especially considering the millions of kids being raised by single moms, etc. Give us the legal help we need to raise our kids well.

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87. Evan Wolfson, *Enough Marriage to Share: A Response to Maggie Gallagher*, in *Marriage and Same-Sex Unions: A Debate* 25, 26 (Lynn D. Wardle et al. eds., Praeger 2003).

88. Sen. Subcomm. on the Const., Civil Rights and Prop. Rights, *Hearings on The Defense of Marriage Act*, 108th Cong. (Sept. 4, 2003) (written statement of Prof. Judith Stacey, Ph.D., Dept. of Sociology, N.Y.U.).

89. Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in *All Our Families: New Policies for a New Century* 117, 128-29 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., Oxford U. Press 1998).

But because same-sex marriage, like marriage itself, is primarily about the sanctification narrative, this will not do. Same-sex marriage is an expression of a powerful public commitment to the ideal that there are no important differences between gay and straight, between same-sex relationships and other kinds of relationships. Getting to that commitment necessarily requires us to consistently deny or downgrade the significance of the biggest, most obvious and intractable difference between same-sex and opposite-sex unions: that only the latter are capable of producing children and uniting the child with his own mother and father.

2. What courts have ruled

Another reason to believe that moving to same-sex marriage requires downgrading or eliminating the idea that mothers and fathers matter, or that marriage is symbolically related to procreation: courts that adopt same-sex marriage say so. Observing that "many *opposite*-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children,"[90] and again that "increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children,"[91] the Vermont Supreme Court in 1999 rejected the state's assertion that marriage laws were intended to promote children, or a connection between children and their biological parents.[92] The Massachusetts Supreme Judicial Court was even more dismissive:

> It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. . . . But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in 'the modern age,' 'heterosexual intercourse, procreation, and child care are not necessarily conjoined.'[93]

Similarly, every court decision moving us towards gay marriage downgrades procreation, explicitly and rigorously.[94] People who argue that this

90. *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999).

91. *Id.* at 882.

92. *Id.*

93. *Goodridge*, 798 N.E.2d at 961 (quoting portions of Justice Cordy's dissenting opinion).

94. *See e.g. id.* ("[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."); *Baker*, 744 A.2d at 882 ("The State also argues that because same-sex couples cannot conceive a child on their own, their exclusion promotes a 'perception of the link between procreation and child rear-

procreative potential has anything important to do with what marriage is for are only fooling themselves, or trying to fool others, about their real motivations. So the *Goodridge* court, for example, argues:

> The 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like 'Amendment 2' to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly 'identifies persons by a single trait and then denies them protection across the board.' *Romer v. Evans*, 517 U.S. 620, 633, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.[95]

In order to make gay relationships fully equal, the state—through the courts—must repress from its own consciousness (and hopefully eventually from the people of the state) the idea that the procreative potential of opposite-sex couples is worthy of special attention. It is a difference that *ought* to make no difference.

The court's commitment to demoting procreation leads it to demote as well the most obvious product of sexual procreation: the norm that every child has (or ought to have) a mother and a father. Parenthood as a legal construct is rooted in deep ways in human biology and the social realities to which it gives rise. Who are the parents? The people who make the baby.

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ing,' and that to discard it would 'advance the notion that mothers and fathers . . . are mere surplusage to the functions of procreation and child rearing.' Apart from the bare assertion, the State offers no persuasive reasoning to support these claims. . . . Accordingly, there is no reasonable basis to conclude that a same-sex couple's use of the same technologies would undermine the bonds of parenthood, or society's perception of parenthood."); *Castle v. State*, 2004 WL 1985215 at *14 (Wash. Super. Sept. 7, 2004) ("The State argues that partners in a marriage are expected to engage in exclusive sexual relations with children the probable result and paternity presumed. Amicus also relies on this oft-cited reason that the state has an interest in limiting marriage to opposite sex couples to encourage procreation and child-rearing within stable environments. This Lilliputian view of our present community does not reflect our common reality. . . . No one argues that heterosexual couples must have children, even if they are able, or that divorce is not a common experience for children of heterosexual marriages."); *Anderson v. King County*, 2004 WL 1738447 at **18-19 (Wash. Super. Aug. 4, 2004) ("The legal question is not whether heterosexual marriage is good for the replenishment of the species through procreation. It is. The precise question is whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation. There is no logical way in which it does so."); *Halpern*, 65 O.R.3d at ¶ 121 ("We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples.").

95. *Goodridge*, 798 N.E.2d at 962.

Each child therefore has a mom and a dad. As with marriage, the law of parenthood is not creating something from scratch, but recognizing and therefore regulating a key pre-existing social institution. When neither parent is able or willing to live up to their responsibilities, the state steps in and tries to give children other parents (foster or adopted) to do what their own original parents have failed to do.[96]

That only sexual unions of men and women make babies is one great fact of human existence. The fact that only sexual unions of men and women can, therefore, give babies both their mother and their father is a second great corollary fact of existence that must be downgraded before the same-sex marriage advocates' equality dream can be realized.

And, sure enough, the *Goodridge* majority moves to aggressively combat this idea as well. According to *Goodridge*, the state of Massachusetts is indifferent to family structure. It cares not even one little bit about whether children have the support, love, and attention of both their mothers and their fathers: "Massachusetts has responded supportively to 'the changing realities of the American family,' and has moved vigorously to strengthen the modern family in its many variations."[97]

This is the promise that courts are making to gay people in creating a civil right to same-sex marriage: their relationships are no different than anyone else's. Making good on that promise will require a fair amount of judicial policing on the part of courts, since most people do not share the court's new marriage narrative (marriage is about adult love and children are irrelevant) fully, and a very large chunk reject it absolutely.

3. *The stigmatization effect: thinking through the* Loving v. Virginia *analogy*

But courts are doing more than downgrading or privatizing the older view of marriage—they are stigmatizing it. In *Halpern v. Toronto*, for example, the Ontario Court of Appeals declared the historic understanding of marriage as the union of husband and wife "offends the dignity of persons in same-sex relationships."[98] The *Goodridge* court ruled that our current marriage system is "caste-like" resting upon "invidious distinctions" that are "totally repugnant."[99] No rational reason can explain why any individual would support such a marriage idea. Therefore support for the older meaning of marriage as the union of husbands and wives is "rooted in per-

96. The one exception to the general rule that the people who make the child are the parents, unless they are unable or unwilling to assume the responsibility, is artificial insemination of single women. Here, the state affirmatively steps in to cut off the child's relationships with its biological father, merely because the mother wishes the child to have no father.

97. 798 N.E.2d at 963 (quoting *Troxel v. Granville*, 530 U.S. 57, 64 (2000)).

98. *Halpern*, 65 O.R.3d at ¶ 107.

99. 798 N.E.2d at 972.

sistent prejudices against persons who are . . . homosexual," which the Constitution "cannot control" but "neither can it tolerate them."[100]

Similarly, virtually all advocates for same-sex marriage—including Koppelman—argue vigorously that the exclusion of same-sex couples from the legal status of marriage is hateful and discriminatory in precisely the same way that bans on interracial marriage are hateful and discriminatory.[101]

On the merits, I disagree.[102] But let us assume for the sake of argument that I am wrong. What if the *Goodridge* court and other advocates of same-sex marriage are correct that this historic, cross-cultural, feature of marriage represents a discriminatory, bigoted idea based only on animus towards homosexuals? What if we take the analogy to *Loving v. Virginia* seriously?

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100. *Id.* at 968.

101. *See e.g.* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 236-37 (1994) ("As in the case of miscegenation, the judicial argument may end with a recognition of the homosexuality taboo's misogynistic implications, which are recognizable by most Americans. Both prohibitions clearly violate the fourteenth amendment as it is understood by the stigma theorists. Implicit in both taboos are the premises—incompatible with equal concern and respect for all citizens—that sexual penetration is a nasty, degrading violation of the self, and that there are some people (in the case of the homosexuality taboo, women) to whom, because of their inferior social status, it is acceptable to do it, and others (men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them. Thus, a court could dispose of a law that discriminates against gays with a brief allusion to well-known cultural meanings, along the lines of *Loving v. Virginia*."); Evan Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* 59 (Simon & Schuster 2004) ("[T]oday's battle over gay people's freedom to marry is not just about gay and lesbian people. It is a chapter in a civil rights struggle as old as the institution of marriage itself, a struggle that has been borne by women seeking equality, people seeking to marry others of a different race, adults seeking to make their own decisions about parenting and sex, and married couples seeking an end to failed or abusive unions.") (characterizing a column by Eric Zorn); Rauch, *supra* n. 85 at 173 ("[P]erpetuating the ban on same-sex marriage . . . links marriage with discrimination at a time when, throughout the liberal world, discrimination is sinking into disrepute."); Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. Chi. L. Sch. Roundtable 61, 90 (2000) ("While *Loving* of course does not *establish* that the right to marry a same-sex partner is constitutionally protected, it and the subsequent right to marry cases establish the necessity of closely examining the articulated state interests allegedly justifying such a marital prohibition. It is difficult to understand how the reasons thus far articulated to justify same-sex marriage bans could ever withstand the requisite scrutiny."); Mary L. Bonauto, *Denying Marriage Rights is Unconstitutional*, 19 Me. B. J. 78, 82 (2004) ("The decision whether to marry, and who to marry, 'has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.' *Loving v. Virginia*, 388 U.S. 1, 12 (1967). . . . As the cases striking anti-miscegenation laws make clear, 'the right to marry means little if it does not include the right to marry the person of one's choice . . . .' *Goodridge*, 798 N.E.2d at 958.").

102. Reserving marriage as the union of husband and wife is no more discrimination than restricting Social Security to people over age 67 is age discrimination. Laws against interracial marriage had nothing to do with the public purposes of marriage. They were about racism. They were about keeping two races distinct so that one race could continue to oppress the other. The distinction the law makes between same-sex and opposite-sex couples is not discrimination because it is neither arbitrary nor invidious. It is rooted in the nature and public purpose of the institution.

If the older understanding of marriage is inherently discriminatory, the law will begin, necessarily and inexorably, to exert strong chilling effects on a variety of people and institutions of civil society that might otherwise attempt to transmit this vision of marriage to the next generation.

Relatively little attention from scholars has focused on the consequences to the vast majority of American religious institutions, schools, charities, and ministries if the law imposes same-sex marriage as a civil right. Marriage is not a private act; it is a public, legal status.

But Mary Ann Glendon and several legal scholars recently warned:

> [C]hurches and other religious organizations that fail to embrace civil unions as indistinct from marriage may be forced to retreat from their practices, or else face enormous legal pressure to change their views. Precedent from our own history and that of other nations suggests that religious institutions could even be at risk of losing tax-exempt status, academic accreditation, and media licenses, and could face charges of violating human rights codes or hate speech laws.[103]

If same-sex marriage is a right, powerful legal pressures will be brought to bear on religions and other organizations that fail to acknowledge this right. The capacity of schools and faith communities to transmit the marriage idea to the next generation will be sharply curtailed. People who believe that children need mothers and fathers will be treated like bigots in the public square.

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103. Mary Ann Glendon et al., *Private Legal Opinion Memorandum to the Massachusetts Catholic Conference*, http://www.cwfa.org/images/content/MCCOpinion.pdf (Mar. 5, 2004) (citing *Bob Jones U. v. U.S.*, 461 U.S. 574, 586 (1983) ("an institution seeking tax-exempt status must . . . not be contrary to established public policy")); *see Levin v. Yeshiva*, 754 N.E.2d 1099 (N.Y. 2001) (finding private university housing policy distinguishing between married and unmarried couples to constitute sexual orientation discrimination in violation of city human rights ordinance); *Trinity W.U. v. College of Teachers* (British Columbia), 2001 Carswell BC 1017 (Canada) (reversing decision of the College of Teachers to deny accreditation to Trinity Western University based on its code of conduct prohibiting homosexual behavior); *CKRD re Focus on the Family*, Canadian Broadcast Standards Council Decision 96/97-0155 (Dec. 16, 1997) (available at http://www.cbsc.ca/english/decisions/decisions/1997/971216i.htm) (finding that radio station CKRD-AM violated the Canadian Association of Broadcasters' *Code of Ethics* in broadcasting a segment of the Focus on the Family radio program on February 9, 1997); Liam Reed, *Legal Warning to Church on Gay Stance*, Irish Times 1 (Aug. 2, 2003) (Irish Council for Civil Liberties warning that Roman Catholic Church teaching on homosexual unions could violate Ireland's 1989 Incitement to Hatred Act); Religion News Serv., *Gay Group Sues After Sermon*, Wash. Post B7 (Jan. 3, 2004) (lawsuit alleging "slander and incitement to discrimination" filed against Cardinal Antonio Maria Rouco Varela after comment in sermon suggesting that same-sex marriage would bring down the country's social security system); *see also Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (upholding Connecticut's exclusion of Boy Scouts from state employee workplace charitable campaign due to organization's policy on homosexual scoutmasters); *Catholic Charities of Sacramento v. Super. Ct.*, 32 Cal. 4th 527 (Cal. 2004) (ruling that Catholic Charities do not fall within the religious exemption of a statute requiring contraceptive coverage as part of employee health insurance plans and are not constitutionally protected from application of the statute).

4. The argument from despair

Which brings us to the last, most powerful weapon in Koppelman's and other SSM-advocates' arsenal: same-sex marriage is inevitable, lie back and get on the right side of history, for we've won the debate among young people. Koppelman relies heavily on this, as evidence both of the inevitability of gay marriage and of the utter irrationality of arguments against it. The young, it seems, are wise and morally superior, and ultimately all-powerful, too. As Koppelman explains, "[L]ife in a democratic and pluralist society tends to promote more egalitarian attitudes toward differences of gender and sexual orientation. That's reflected in the generational divide over same-sex marriage: while most Americans oppose it, most 18-to-29-year-olds are in favor."[104]

Well, maybe. But maybe, just maybe, the young are inexperienced and even occasionally ignorant. Maybe they've been relentlessly propagandized by only one side of the gay marriage debate for years. Maybe if the adults in their lives—parents, teachers, clergy—speak up and explain the importance of marriage as a social institution, why marriage isn't bigotry, why mothers and fathers both matter to kids, their opinions will change. Maybe, as more and different people begin to speak honestly about the risks of same-sex marriage to the next generation, they will listen.

And maybe, by the way, next generation opinion about same-sex marriage is not nearly as unanimous as Prof. Koppelman and many others believe.[105] Young adults are certainly more likely to favor same-sex marriage than older Americans. But polls find wide variations in young adult support for gay marriage between polls, and some evidence of declining support for gay marriage in recent time periods. The most recent Gallup polls show

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104. Koppelman, *supra* n. 1, at 32.

105. For example, Jason West, the 27-year-old mayor of New Paltz, New York who issued marriage licenses to same-sex couples earlier this year, explained: "It's inevitable that we'll have same-sex marriage in this country, because it's a generational question. . . . Give it 10 or 20 years when we're holding state legislatures and Congress. It will just be a non-issue." Carl Weiser, *They're Young, Savvy, Hip: They're the Government*, Cincinnati Enquirer 1A (July 18, 2004). Jonathan Rauch of the Brookings Institution told the Denver Post "[The Federal Marriage Amendment] will get harder to pass over time. . . . People will get used to gay marriages in Massachusetts, the edge will be taken off the issue over time, plus . . . young voters are pro-gay marriage." Anne C. Mulkern, *Gay-Marriage Ban Fails, Procedural Vote Scraps Measure*, Denver Post A1 (July 15, 2004). Evan Wolfson, executive director of Freedom to Marry, writing for WashingtonPost.com, claimed that "young people overwhelmingly support marriage equality." Evan Wolfson, *Massachusetts Ruling on Same-Sex Marriage*, http://www.washingtonpost.com/wp-dyn/articles/A16097-2004Feb5.html (Feb. 5, 2004). In the Wall Street Journal last October, Andrew Sullivan went so far as to say that 67 percent of young adults "believe that gay marriage would benefit society." Andrew Sullivan, *The State of Our Unions*, Wall St. J. A24 (Oct. 8, 2003) (available at http://www.opinionjournal.com/ac/?id=110004130) (The USA Today poll Sullivan cited actually showed 24% of young adults thought gay marriage would benefit society, while 43% thought it would make no difference. Andrew Sullivan later corrected the error on his website but maintained his general point still held.).

that among the "next" next generation (teens aged 13 to 17 years old), 63 percent currently oppose same-sex marriage.[106]

V. Conclusion

Court-created same-sex marriage will transform our shared, public meaning of the word "marriage." It will disconnect marriage from any further relationship with its great historic task of making the next generation, and connecting those children to both their mothers and fathers. A new unisex language of parenting in the public square will demote the idea that "children need mothers and fathers" to a form of rudeness or bigotry. Organizations that try to transmit in any strong way to the next generation the idea that marriage is about creating and connecting children to their mothers and fathers will be increasingly treated the way bigots who oppose interracial marriages are treated in the public square. Because religious organizations are complex with multiple goals (like saving souls), even fairly minor legal threats to tax exempt status are likely to have major impacts on the willingness of faith-based organizations to advocate strongly for their own vision of marriage or fatherhood in the public square, and within their own faith communities.

You can see the beginning of all these changes in Massachusetts, where the marriage license already reads not Husband and Wife, but "Party A" and "Party B."[107] Where the Health Department has advocated for changing birth certificates so they no longer read mother and father, but "Parent A" and "Parent B."[108] Where Catholic universities are mulling whether or not they have to house gay couples in married student housing[109] and public schools are being warned they have an obligation to educate young people about the goodness of the new marriage law regime.[110]

106. Support for gay marriage among 18-29 year olds may have peaked in June 2003, when Gallup found young adults favoring gay marriage 61% to 36%. By December of 2003, however, following the *Goodridge* decision, support had fallen to 44%, with 53% opposed to gay marriage. Polling data in 2004 has continued to fluctuate widely, suggesting uncertainty in the underlying opinions. For further discussion, *see* Maggie Gallagher & Joshua K. Baker, *Same-Sex Marriage: What Does the Next Generation Think?*, http://www.marriagedebate.com/pdf/iMAPP.NextGen SSM.pdf (Nov. 23, 2004).

107. Fred Bayles, *Mass. Preparing for a Rush of Gay Weddings*, USA Today 15A (May 13, 2004).

108. Sen. Jud. Comm. On Jud., *Preserving Traditional Marriage: A View from the States*, 108th Cong. (June 22, 2004) (statement of Massachusetts Governor Mitt Romney).

109. Rhonda Stewart, *Catholic Colleges Consider Marriage Law: Say They'll Follow Ruling on Same-Sex Unions*, Boston Globe: Globe West 9 (May 16, 2004).

110. Superintendent Thomas W. Payzant, *Memorandum to Boston Public Schools Staff re: Supreme Judicial Court Decision on Same-Sex Marriage* (May 13, 2004) ("It behooves us, whatever our position may be on this issue, to use this opportunity to help our students understand [this historic moment] as a vital manifestation of some of the principles that have shaped our system of government – such as rule of law, balance of powers, and separation of church and state – as well as another step in our continuing efforts to create a more just society for all of our citizens.").

These are real and significant potential threats to an extremely important social institution. Of course some may disagree. And some people may judge the reward worth the risk. But simply closing your eyes to the reality that same-sex marriage represents an enormous change in marriage law with potentially large repercussions for American society will not make that reality go away.

iMAPP Policy Brief

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DO MOTHERS AND FATHERS MATTER?

The Social Science Evidence on Marriage and Child Well-Being

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Do children do best when they are raised by their own married mother and fathers, or are alternative family forms just as good at protecting children? An emerging bi-partisan consensus on marriage and child well-being is being challenged by research on gay and lesbian parenting, which some scholars and advocates say shows that children do just as well raised by unisex couples. How should policymakers and other elites evaluate these two competing bodies of evidence?

I. MARRIAGE AND CHILD WELL-BEING: THE EMERGING CONSENSUS

In the last thirty years, thousands of studies evaluating the consequences of marriage have been conducted in various disciplines (*e.g.*, psychology, sociology, economics, and medicine). Twelve leading family scholars recently summarized the research literature this way: "Marriage is an important social good associated with an impressively broad array of positive outcomes for children and adults alike. . . . [W]hether American society succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public concern."[1] Among their conclusions:

- Marriage increases the likelihood that children enjoy warm, close relationships with parents.
- Cohabitation is not the functional equivalent of marriage.
- Children raised outside of intact married homes are more likely to divorce or become unwed parents themselves.
- Marriage reduces child poverty.
- Divorce increases the risk of school failure for children, and reduces the likelihood that they will graduate from college and achieve high status jobs.
- Children in intact married homes are healthier, on average, than children in other family forms.
- Babies born to married parents have sharply lower rates of infant mortality.
- Children from intact married homes have lower rates of substance abuse.
- Divorce increases rates of mental illness and distress in children, including the risk of suicide.
- Boys and young men from intact married homes are less likely to commit crimes.
- Married women are less likely to experience domestic violence than cohabiting and dating women.
- Children raised outside of intact marriages are more likely to be victims of both sexual and physical child abuse.

They conclude, "Marriage is more than a private emotional relationship. It is also a social good. Not every person can or should marry. And not every child raised outside of marriage is damaged as a result. But communities where good-enough marriages are common have better outcomes for children, women, and men than do communities suffering from high rates of divorce, unmarried childbearing, and high-conflict or violent marriages."[2]

Recent analyses by mainstream child research organizations confirm this consensus that family structure matters across ideological and partisan lines. (Please note: the research cited below does not explicitly compare children in married intact families to children raised by unisex couples, or children with a single gay or lesbian parent. For research on children in these novel family structures, see Section II, below.) For example:

- A *Child Trends* research brief summed up the scholarly consensus: "Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents."[3]
- An Urban Institute scholar concludes, "Even among the poor, material hardships were substantially lower among married couple families with children than among other families with children. . . . The marriage impacts were quite huge, generally higher than the effects of education. The impacts [of marriage] were particularly high among non-Hispanic black families."[4]
- A Centers for Disease Control report notes, "Marriage is associated with a variety of positive outcomes, and dissolution of marriage is associated with negative outcomes for men, women, and their children."[5]
- A Center for Law and Social Policy Brief concludes, "Research indicates that, on average, children who grow up in families with both their biological parents in a low-conflict marriage are better off in a number of ways than children who grow up in single-, step-, or cohabiting-parent households."[6]

While scholars continue to disagree about the size of the marital advantage and the mechanisms by which it is conferred,[7] the weight of social science evidence strongly supports the idea that family structure matters and that the family structure that is most protective of child well-being is the intact, biological, married family.

II. The Social Science of Gay Parenting: A Competing Body of Evidence?

Most of the research on family structure, however, does not directly compare children in intact married homes with children raised from birth by same-sex couples. Thus the powerful new consensus on family structure is on a collision course with a separate emerging consensus from a related field: the social science literature on sexual orientation and parenting.

Judith Stacey summed up this new challenge to the social science consensus on family structure in testimony before the U.S. Senate this way:

> The research shows that what places children at risk is not fatherlessness, but the absence of economic and social resources that a qualified second parent can provide, whether male or female. . . . Moreover, the research on children raised by lesbian and gay parents demonstrates that these children do as well if not better than children raised by heterosexual parents. Specifically, the research demonstrates that children of same-sex couples are as emotionally healthy and socially adjusted and at least as educationally and socially successful as children raised by heterosexual parents.[8]

Other researchers, including at least two prominent professional associations, have made similar claims.[9] Advocates for same-sex marriage often rely on these studies to assert that scientific evidence shows that married mothers and fathers hold no advantages for children. As Mary Bonauto, counsel for the plaintiffs in the Massachusetts marriage litigation, wrote in the Summer 2003 edition of *Human Rights*, "[C]hild-rearing experts in the American Academy of Pediatrics, the American Psychiatric Association, and the

American Psychological Association insist that the love and commitment of two parents is most critical for children—not the parents' sex or sexual orientation."[10]

Similarly Evan Wolfson, head of Freedom to Marry, asserted recently, "|T|here is no evidence to support the offensive proposition that only one size of family must fit all. Most studies—including the ones that |Maggie| Gallagher relies on—reflect the common sense that what counts is not the family structure, but the quality of dedication, commitment, self-sacrifice, and love in the household."[11]

III. WEIGHING THE EVIDENCE

How should legal thinkers and decision-makers evaluate such competing claims about family structure and child well-being both allegedly grounded in social science evidence?

Numerous reviews of the literature on sexual orientation and parenting have been conducted.[12] At least three such reviews have pointed to the serious scientific limitations of the social science literature on gay parenting.[13]

Perhaps the most thorough review was prepared by Steven Nock, a sociologist at the University of Virginia who was asked to review several hundred studies as an expert witness for the Attorney General of Canada. Nock concluded:

> Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research.[14]

Design flaws researchers have found in these studies include very basic limitations:

a. **No nationally representative sample.** Even scholars enthusiastic about unisex parenting, such as Stacey and Biblarz, acknowledge that "there are no studies of child development based on random, representative samples of [same-sex couple] families."[15]

b. **Limited outcome measures.** Many of the outcomes measured by the research are unrelated to standard measures of child well-being used by family sociologists (perhaps because most of the researchers are developmental psychologists, not sociologists).

c. **Reliance on maternal reports.** Many studies rely on a mother's report of her parenting skills and abilities, rather than objective measures of child outcomes.

d. **No long-term studies.** All of the studies conducted to date focus on static or short-term measures of child development. Few or none follow children of unisex parents to adulthood.

But perhaps the most serious methodological critique of these studies, at least with reference to the family structure debate, is this:

The vast majority of these studies compare single lesbian mothers to single heterosexual mothers. As sociologist Charlotte Patterson, a leading researcher on gay and lesbian parenting, recently summed up, "|M|ost studies have compared children in divorced lesbian mother-headed families with children in divorced heterosexual mother-headed families."[16]

Most of the gay parenting literature thus compares children in some fatherless families to children in other fatherless family forms. The results may be relevant for some legal policy debates (such as custody disputes) but, in our opinion, they are not designed to shed light on family structure per se, and cannot credibly be used to contradict the current weight of social science: family structure matters, and the family structure that is most protective a child well-being is the intact, married biological family.

Children do best when raised by their own married mother and father.

Endnotes

[1] William J. Doherty, et al., 2002. *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* (New York: Institute for American Values): 6 (co-authors include William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman, Barbara Markey, Howard J. Markman, Steven Nock, David Popenoe, Gloria G. Rodriguez, Isabel V. Sawhill, Scott M. Stanley, Linda J. Waite, and Judith Wallerstein).

[2] *Id.* at 18.

[3] Kristin Anderson Moore, et al., 2002. "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?", *Child Trends Research Brief* (Washington, D.C.: Child Trends) (June): 1 (available at http://www.childtrends.org/PDF/MarriageRB602.pdf). This research brief on family structure does not compare outcomes for children in same-sex couple households to children in other types of families.

[4] Robert I. Lerman, 2002. "Impacts of Marital Status and Parental Presence on the Material Hardship of Families with Children," *The Urban Institute* (Washington, D.C.: Urban Institute) (July): 27 (available at http://www.urban.org/url.cfm?ID=410538).

[5] Matthew D. Bramlett & William D. Mosher, 2001. "First Marriage Dissolution, Divorce, and Remarriage: United States," *CDC Advance Data* no. 323 (May 31): 1.

[6] Mary Parke, 2003. "Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being," *CLASP Policy Brief* no. 3 (Washington, D.C.: Center for Law and Social Policy) (May): 6. These are findings about the family structure debate in general. On the question of sexual orientation and parenting, the brief summarizes the social science this way: "Although the research on these families has limitations, the findings are consistent: children raised by same-sex parents are no more likely to exhibit poor outcomes than children raised by divorced heterosexual parents. Since many children raised by gay or lesbian parents have undergone the divorce of their parents, researchers have considered the most appropriate comparison group to be children of heterosexual divorced parents. Children of gay or lesbian parents do not look different from their counterparts raised in heterosexual divorced families regarding school performance, behavior problems, emotional problems, early pregnancy, or difficulties finding employment. However, as previously indicated, children of divorce are at higher risk for many of these problems than children of married parents." *Id.* at 5.

[7] *See, e.g.*, E. Mavis Heatherington & John Kelly, 2002. *For Better or For Worse–Divorce Reconsidered* (New York: W. W. Norton & Co.).

[8] *What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary,* 108th Cong., Sept. 4, 2003 (written statement of Prof. Judith Stacey, Ph.D., Department of Sociology, New York University).

[9] In December 1999, Stanford University Law Professor Michael Wald released an analysis of Proposition 22, a proposed initiative statute which would define marriage as the union of one man and one woman under California law. Assessing the claim that "it is better for children to be raised by two opposite-sex married parents," the author points to social science research and concludes baldly, "[T]he evidence does not support these claims." Michael S. Wald, 1999. *Same-Sex Couples: Marriage, Families, and Children: An Analysis of Proposition 22, The Knight Initiative* (Stanford, The Stanford Institute for Research on Women and Gender & The Stanford Center on Adolescence): 11; *see id.* at vi ("Some opponents of same-sex couple marriage content that it is harmful for children to be raised by gay or lesbian parents. Again, there is a large body of research available to assess this claim.") (citing a statement from the American Psychological Association). In 1995, the American Psychological Association (APA) issued a statement indicating that, based upon the available scientific data, children raised by lesbian and gay parents are not "disadvantaged in any significant respect relative to the children of heterosexual parents." American Psychological Association, *Lesbian and Gay Parenting: A Resource for Psychologists* (1995) (available at www.apa.org/pi/parent.html). The American Academy of Pediatrics (AAP) issued a similar policy statement, concluding "that the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes towards parenting." American Academy of Pediatrics, 2002. "Coparent or Second-Parent Adoption by Same-Sex Parents," *Pediatrics* 109(2): 339-340 (February) (available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339.

[10] Mary L. Bonauto, 2003. "Civil Marriage as a Locus of Civil Rights Struggles," *Human Rights* (Summer): 3, 7.

[11] Evan Wolfson,2003. "Enough Marriage to Share: A Response to Maggie Gallagher," *in* Lynn Wardle, et al., eds., *Marriage and Same-Sex Unions: A Debate* (Westport, CT: Praeger):25, 26-27.

[12] American Academy of Pediatrics, 2002. "Coparent or Second-Parent Adoption by Same-Sex Parents," *Pediatrics* 109(2) (February): 339-340 (available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339); Judith Stacey & Timothy Biblarz, 2001. "(How) Does The Sexual Orientation of Parents Matter?," Am. Sociological

Rev. 66: 159; C. Patterson, 2000. "Family Relationships of Lesbians and Gay Men," *Journal of Marriage and Family* 62: 1052-1069; M. Kirkpatrick, 1997. "Clinical Implications of Lesbian Mother Studies," *Journal of Homosexuality* 14 (1/2): 201-211; American Psychological Association, 1995. *Lesbian and Gay Parenting: A Resource for Psychologists* (available at www.apa.org/pi/parent.html); C. Patterson, 1995. "Lesbian Mothers, Gay Fathers and Their Children," *in* A. R. D'Augelli & C. Patterson, *Lesbian, Gay and Bisexual Identities Across the Lifespan: Psychological Perspectives*: 262-290; C. Patterson, 1992. "Children of Lesbian and Gay Parents," *Child Development* 63: 1025-1042; G.D. Green & F.W. Bozett, 1991. "Lesbian Mothers and Gay Fathers," *in* J.C. Gonsiorek & J. D. Weinrich eds., *Homosexuality: Research Implications for Public Policy*, J.J. Bigner & F.W. Bozett, 1990. "Parenting by Gay Fathers," *Marriage and Family Review* 14 (3/4): 155-175; J.S. Gottman, "Children of Gay and Lesbian Parents," *Marriage and Family Review* 14 (3/4): 177-196; F.W. Bozett, 1989. "Gay fathers: A Review of Literature," *Journal of Homosexuality* 18 (1/2): 137-162; D. Cramer, 1986. "Gay Parents and Their Children: A Review of Research and Practical Implications," *Journal of Counseling and Development* 64: 504-507.

[13] Diana Baumrind, 1995. "Commentary on Sexual Orientation: Research and Social Policy Implications," *Developmental Psychology* 31 (No. 1): 130; Affidavit of Stephen Lowell Nock, Halpern v. Attorney General of Canada, No. 684/00 (Ont. Sup. Ct. of Justice); Robert Lerner & Althea K. Nagai, 2001. *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* (Washington, D.C.: Marriage Law Project). In addition Judith Stacey and Timothy Biblarz, 2001. "(How) Does The Sexual Orientation of Parents Matter?," *American Sociological Review* 66: 159, while generally supportive of same-sex parenting, acknowledge important methodological limitations in existing research. For example the authors acknowledge that "there are no studies of child development based on random, representative samples of [same-sex couple headed] families."

[14] Nock Aff. ¶ 3, Halpern v. Attorney General of Canada, No. 684/00 (Ont. Sup. Ct. of Justice) (copies available from the Institute for Marriage and Public Policy; joshua@imapp.org). In 1995, prominent Berkeley sociologist Diana Baumrind reviewed various parenting studies, including the work of Charlotte Patterson and David Flaks. Diana Baumrind, 1995. "Commentary on Sexual Orientation: Research and Social Policy Implications," *Developmental Psychology* 31(1): 130. In her review, Professor Baumrind evaluated, among other things, the claim that children of homosexual parents suffered no adverse outcomes, and were no more likely to develop a homosexual sexual orientation than were children not raised in such homes. Problems Baumrind found with the research she reviewed included the use of small, self-selected convenience samples, reliance on self-report instruments, and biased study populations consisting of disproportionately privileged, educated, and well-off parents. Due to these flaws, Baumrind questioned the conclusions on both "theoretical and empirical grounds." *Id.* at 133-134. Another review, prepared by Robert Lerner and Althea Nagai in 2001, looked at 49 separate parenting studies before concluding that "the methods used in these studies are so flawed that the studies prove nothing." Robert Lerner & Althea K. Nagai, 2001. *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* (Washington, D.C.: Marriage Law Project): 6.

[15] Judith Stacey and Timothy Biblarz, 2001. "(How) Does The Sexual Orientation of Parents Matter?", *American Sociological Review* 66:159, 166.

[16] Charlotte J. Patterson et al., 2000. "Children of Lesbian and Gay Parents: Research, Law and Policy," *in* Bette L. Bottoms et al., eds., *Children and the Law: Social Science and Policy* 10-11 (available from lead author at cjp@virginia.edu); *see also* Charlotte J. Patterson, 2000. "Family Relationships of Lesbians and Gay Men," *Journal of Marriage and Family* 62: 1052-1069.

Case Nos. 10-2204, 10-2207 and 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees,
HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

BRIEF OF *AMICUS CURIAE*, NATIONAL ORGANIZATION FOR MARRIAGE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amicus curiae*, the National Organization for Marriage, is not a corporation that issues stock or has a parent corporation that issues stock.

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January 19, 2011

Statement of Compliance with Rule 29(c)(5)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

/s William C. Duncan
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January 19, 2011

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INTERESTS OF THE *AMICI* AND CONSENT TO FILE

The National Organization for Marriage (NOM) is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM was formed in response to the need for an organized opposition to same-sex marriage in state legislatures and it serves as a national resource for marriage-related initiatives at the state and local level, having been described by the Washington Post as "the preeminent organization dedicated to preventing the legalization of same-sex marriage."[1] In 2008, NOM formed a California ballot initiative committee in support of Proposition 8, emerging as the largest single donor to the Prop 8 campaign. The outcome of this litigation will impact NOM's ability to pursue its mission nationally. The National Organization for Marriage is exempt from federal income tax under Internal Revenue Code § 501(c)(4).

All parties have consented to the filing of all amicus briefs.

ARGUMENT

I. The novel interpretation of the Tenth Amendment by the court below is a dramatic departure from long established practice and precedent.

[1] Monica Hesse, *Opposing Gay Unions With Sanity and a Smile*, Washington Post, August 28, 2009, at C01.

The court below found that "DOMA plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens" and so "the statute violates the Tenth Amendment." Memorandum at 28.

As Professor Richard Epstein has noted, this is a "novel" understanding of the Tenth Amendment.[2] Columnist Charles Lane suggested a reason for the novel conclusion: "In fairness to the judge, the Justice Department seems not to have presented these facts to the court, and they aren't mentioned in the only historical document in the record before him, an affidavit from Harvard historian Nancy Cott from which [Judge] Tauro quotes frequently."[3]

Whatever the origin of the misunderstanding of the scope of the Tenth Amendment, the court below turned the Tenth Amendment on its head. Rather than protecting against federal usurpation of powers reserved to the states, the ruling below would allow each state to impose its own definition of marriage on the federal government in a sort of reverse Supremacy Clause. While Congress *may* adopt state classifications for purposes of federal law, it is under no

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[2] Richard A. Epstein, *Judicial Offensive Against Defense of Marriage Act*, FORBES, July 12, 2010 at http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html.

[3] Charles Lane, *Judge Tauro's Questionable Past*, WASHINGTON POST, July 9, 2010 at http://voices.washingtonpost.com/postpartisan/2010/07/judge_tauros_questionable_past.html.

compulsion to do so. Plaintiffs offer no other example where such a reverse Tenth Amendment analysis is applied – forcing Congress to adopt state classifications for purposes of federal statutes. As the Department of Justice has noted, the court below also relied on a legal test for its Tenth Amendment that has been overruled. (Brief for the United States Department of Public Health and Human Services, at al. at 59-60).

Here, Congress is not infringing upon the powers of any state to regulate matters of family law, including adopting its own definition of marriage. Similarly, there is no suggestion that Congress lacks authority to legislate in the subject matter areas for which marriage is used to classify (e.g., taxation, immigration, etc.), but only that Congress must defer to each state in defining classifications and eligibility. Thus, under the court's analysis below, Congress may unquestionably legislate in the area of taxation, but must defer to the states in determining who is permitted to file a joint return. Or Congress may regulate immigration status, but must defer to individual state marriage laws in determining whether to grant certain visa or citizenship applications, creating a patchwork effect in which federal statutes are applied differently to residents of different states (and potential conflict in matters involving more than one state).

The court below failed to consider that Congress regularly adopts definitions for purposes of federal law which may conflict with the definition which some or all states may ascribe to the same term. This provides for a uniform application of federal law throughout the country, without infringing upon the power of states to regulate domestic relationships. Moreover, in the specific context of marriage, there is a clear history of Congressional regulation for purposes of federal law.

A. Historical and current precedent and practice demonstrate consistent adherence to the principle that Congress can regulate family law and define marriage in matters of federal law.

As the Department of Justice has noted (Brief for the United States Department of Public Health and Human Services, at al. at 37-39) and contrary to Judge Tauro's suggestion, Congress regularly defines terms for purposes of federal law, including definitions which may differ from the definitions given by one or more states to those same terms. Specifically relevant here, there is abundant precedent for Congressional regulation of family and of marriage for purposes of federal law, including some which the Supreme Court has explicitly upheld. What follows is not an exhaustive list but one that is ample for purposes of illustrating

that the central holding of the court below is inconsistent with past precedents and practice.[4]

Professors Linda Elrod and Robert Spector have noted: "Probably one of the most significant changes of the past fifty years [in American family law] has been the explosion of federal laws . . . and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as . . . domestic violence, and division of pension plans."[5]

Domestic Relations

Congressional enactments of laws relating to domestic relations have a long history and are clearly part of current practice. Some examples are:

Immigration. The Naturalization Act of 1802 provided that children of parents who have been naturalized will automatically become citizens unless their

[4] For a fuller account of the relevant precedent, *see* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951 (2010).

[5] Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 Fam. L.Q. 713, 713, 751 (2009).

fathers were not naturalized.[6] An 1855 immigration law allowed citizenship to women who married citizens and to children of citizens.[7]

Land Grants. In 1803, Congress provided that homestead land south of Tennessee would be given only to heads of families or individuals over 21.[8] An 1804 law protected the land interest of "an actual settler on the lands to granted, for himself, and for his wife and family."[9] The Homestead Act of 1862 specified grants would be limited to "any person who is the head of a family, or who has arrived at the age of twenty-one years."[10] In a 1905 Supreme Court case, *McCune v. Essig*, the Court resolved a dispute between a daughter and her mother and stepfather over a land grant.[11] The daughter argued that state inheritance law should be applied to provide her an interest in the property but the Court said "the words of the [federal Homestead Act] statute are clear" and rejected the daughter's claim that state law, rather than federal, should apply.[12]

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[6] Naturalization Act of 1802, 2 Stat. 153 (1802).
[7] Act of Feb. 10, 1855, 10 Stat. 604 (1855).
[8] Act of Mar. 3, 1803, 2 Stat. 229 (1803).
[9] Land Act of 1804, 2 Stat. 283 (1804).
[10] Homestead Act of 1862, 12 Stat. 392 (1862).
[11] *McCune v. Essig*, 199 U.S. 382 (1905).
[12] Id. at 390.

Military Benefits and Pensions. In 1836, Congress enacted legislation bolstering pensions awarded to widows of Revolutionary War soldiers.[13] The 1890 Dependent and Disability Pension Act also provided for widows and other family members of veterans.[14] Federal courts interpreting military benefits laws have used federal interpretations of family, even at times where the definitions did not accord with state law.[15]

Other Pensions. The federal Employment Retirement and Income Security Act (ERISA) and other federal pension laws have consistently been held to control the marital incidents of pensions.[16]

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[13] Act of July 4, 1836, ch. 362, 5 Stat. 127, 127–28 (1836).
[14] Act of June 27, 1890, ch. 634, 26 Stat. 182, 182–83 (1890).
[15] *See United States v. Jordan*, 30 C.M.R. 424, 429–30 (1960) (finding that the military could limit the defendant's right to marry abroad because of special military concerns); *United States v. Richardson*, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); *United States v. Rohrbaugh*, 2 C.M.R. 756, 758 (1952) (noting, *inter alia*, that common law marriages are specifically recognized "in a variety of matters").
[16] *See e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (pensions governed under ERISA, which preempts community property law); *Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989) (military retirement pay waived in order to collect veterans' disability benefits governed by Uniformed Services Former Spouses' Protection Act (USFSPA), not community property law); *McCarty v. McCarty*, 453 U.S. 210, 232–33, 236 (1981) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979)), *superseded by* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)); *Hisquierdo*, 439 U.S. at 582, 590 (railroad retirement assets governed by federal

Census. In the enabling legislation for the 1850 Census, Congress included a definition of family: "By the term family is meant, either one person living separately in a house, or a part of a house, and providing for him or herself, or several persons living together in a house, or in part of a house, upon one common means of support, and separately from others in similar circumstances. A widow living along and separately providing for herself, or 200 individuals living together and provided for by a common head, should each be numbered as one family. The resident inmates of a hotel, jail, garrison, hospital, an asylum, or other similar institution, should be reckoned as one family." [17]

Copyright. In 1831, Congress enacted a law allowing a child or widow to inherit a copyright.[18] In 1956, the U.S. Supreme Court issued a decision, *DeSylva v. Ballentine*, holding that, in the absence of a federal definition, state law controlled the question of who counted as a child for copyright law.[19] In 1978, Congress effectively reversed this decision by enacting a definition of "child" to

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law, not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (National Service Life Insurance Act governs beneficiary of policy, not community property laws).

[17] U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 9 (2002), *available at* http://www.census.gov/prod/2002pubs/pol02-ma.pdf.

[18] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831).

[19] *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

include a "person's immediate offspring, whether legitimate or not, and any children legally adopted by that person" so as to ensure that – regardless of state law – copyright law would not exclude illegitimate children.[20]

Bankruptcy. Bankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather than state law.[21]This has been recognized in federal court decisions.[22]

Marriage Definitions

Immigration. The Immigration and Naturalization Act provides that marriages contracted for the purpose of gaining preferential immigration status are not valid for federal law purposes.[23] Some states, to the contrary, recognize immigration marriages as valid or voidable.[24] To defer to state law on marriage for

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[20] 17 U.S.C. § 101 (2006); KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 6.5 (1982).
[21] H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.
[22] *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984) (bankruptcy courts look to federal—not state—law to determine whether obligation is in the nature of alimony, maintenance or support); *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982).
[23] *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e).
[24] *See In re Appeal of O'Rourke*, 310 Minn. 373, 246 N.W.2d 461, 462 (Minn. 1976); *Kleinfield v. Veruki*, 173 Va. App. 183, 372 S.E.2d 407, 410 (Va. Ct. App. 1988); *Lutwak v. United States*, 344 U.S. 604, 611 (1953); *id.* at 620–21 (Jackson, J., dissenting); *see also Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1994) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); *Garcia-Jaramillo v. INS*, 604 F.2d

immigration purposes would allow one state to circumvent the entire federal policy.

Taxation. Federal tax law considers a couple who are married under state law but separated as unmarried for tax purposes.[25] A couple who consistently obtain a divorce at the end of the year to obtain single status for tax filing could be considered unmarried for state purposes but married for purposes of federal tax law.[26]

Census. The 2010 Census is including same-sex marriages in its count of marriages.[27] Thus, the same-sex couples from states defining marriage as the union of a man and a woman who get married in a state that allows same-sex couples to

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1236, 1238 (9th Cir. 1979) (arguing that the possibility of marriage being a sham is irrelevant because of valid New Mexico marriage is deemed "frivolous" because of INS' authority to inquire into marriage for immigration purposes); *United States v. Sacco*, 428 F.2d 264, 267–68 (9th Cir. 1970) (ruling, inter alia, that a bigamous marriage did not count as a marriage for federal law purposes).

[25] 26 U.S.C. § 7703(a)(2), (b) (definitions of marital status).

[26] Rev. Rul. 76-255, 1976-2 C.B. 40. *See generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007 2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 714–15 (2009) (discussing *Nihiser v. Comm'r*, 95 T.C.M. (CCH) 1531 (2008); *Perkins v. Comm'r*, 95 T.C.M (CCH) 1165 (2008); *Proctor v. Comm'r*, 129 T.C. 92 (2007); 73 Fed. Reg. 37997 (July 2, 2008)).

[27] *Census to Recognize Same-Sex Marriages in '10 Count*, N.Y. TIMES, June 21, 2009, *available at* http://www.nytimes.com/2009/06/21/us/21census.html?_r=1; *Census Bureau Urges Same-Sex Couples to be Counted*, USA TODAY, April 6, 2010, *available at* http://www.usatoday.com/news/nation/census/2010-04-05-census-gays_N.htm.

marry will be counted as "married" for Census purposes even though the state in which they live considers them unmarried.

Pending Legislation

The proposed Domestic Partnership Benefits and Obligations Act, H.R. 2517, would provide government benefits to registered domestic partners (including same-sex couples who are married) of government employees that are equivalent to those given to spouses of employees. The proposed repeal of DOMA, H.R. 3567, would consider same-sex marriages as valid for federal law purposes even if they are not so recognized in the state of the couple. Ironically, the sponsor of this latter bill hailed Judge Tauro's decision on DOMA, though its import would invalidate his own legislation.[28]

The argument that Congress lacks authority to define marriage for purposes of defining the term in federal statutes is clearly contrary to long precedent and practice. If the central holding of the court below that federal law cannot define marriage or family independent of state definitions were applied consistently, it would require the invalidation of current immigration, tax, bankruptcy, census,

[28] Press Release, *Nadler Hails Federal Court Ruling Against the Defense of Marriage Act*, July 8, 2010 at http://nadler.house.gov/index.php?option=com_content&task=view&id=1517&Itemid=119.

copyright, taxation laws and would be contrary to federal (including Supreme Court) precedent upholding federal laws even when they contrast with state laws.

B. The national government's significant involvement in defining marriage for federal law purposes extends back to the Nineteenth Century and was approved by the U.S. Supreme Court.

This case involves an area of federal jurisdiction—the definition of terms in the United States Code. In the mid-Nineteenth Century, Congress legislated heavily in another area of federal jurisdiction—the government of territories of the United States. *Amicus* recognizes that the relationship of the national government to territories is not the same as its relationship to the states. Although there was no conflicting state law at issue with respect to the federal territories here, both governance of the federal territories and definition for purposes of federal statutes are both limited in scope to matters that are clearly matters of federal jurisdiction. The specific example outlined here, however, is still highly relevant, involving as it does, federal adoption and promulgation of a substantive definition of marriage. In the case of the Defense of Marriage Act, Congress has enacted a substantive definition of marriage in an area of federal jurisdiction—the definition of terms used in federal law. In the case of the precedent of polygamy, Congress enacted a substantive definition of marriage in an area of federal jurisdiction—plenary authority over federal territories.

Between 1862 and 1894, Congress passed five separate statutes intended to repress the development of polygamy as a recognized marriage system in the United States: the Morrill Anti-Bigamy Act of 1862[29], the Poland Act of 1874[30], the Edmunds Anti-Polygamy Act of 1882[31], the Edmunds-Tucker Act of 1887[32] and the Utah Enabling Act of 1894.[33]

The Morrill Anti-Bigamy Act, approved by Congress in 1862 and signed by President Abraham Lincoln, criminalizes in federal law attempts at polygamy in federal territories. The Act was described in the chapter laws as "An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places."[34] The relevant portion of the law read:

> That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided, nevertheless*, That this section shall not extend to any

[29] Statutes at Large, 37th Congress, 2d Session, Ch. 126 at http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532.
[30] 18 Stat. 253, 1874.
[31] Forty-seventh Congress, Sess. I, Ch. 47.
[32] 24 Stat. 635, 1887.
[33] Act of July 16, 1894, ch. 138, 28 Stat. 107.
[34] Statutes at Large, 37th Congress, 2d Session, Ch. 126 at http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532

> person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract.

This measure regulates marriage in federal law in two ways: it criminalizes polygamy, and it also establishes in federal law the common law standard that a spouse who has been missing for a prescribed number of years is "judicially dead" for the purpose of remarriage. Both of these are clear examples of regulating marriage for the purpose of federal law.

Like DOMA, the Congressional ban on polygamy was challenged in federal court. That issue was eventually resolved in the U.S. Supreme Court in a landmark decision, *Reynolds v. United States*.[35]

As to marriage, the Court said:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . . In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule

[35] 98 U.S. 145 (1878).

> of action for all those residing in the Territories, and in places over which the United States have exclusive control.[36]

The Poland Act facilitated prosecutions under the Morrill Act by giving jurisdiction over all cases arising in Utah to the federal courts. The Edmunds Act made bigamy a felony and created a misdemeanor of "unlawful cohabitation." The point of this latter crime was to aid prosecutions since the government could more easily show cohabitation occurred than to prove a marriage (since the religious marriage records were not made available to the government).

In *Murphy v. Ramsey*, the Supreme Court upheld the Edmunds Act against a challenge arguing the law criminalized behavior *ex post facto*.[37] The Court said the law criminalized continuing cohabitation rather than past marriages. The Edmunds was also addressed by the Supreme Court in *Ex Parte Snow*,[38] which said a defendant could only be charged once with unlawful cohabitation and in *Cannon v. United States*, which said a defendant's promise not to engage in sexual intercourse does not preclude prosecution.[39] The Edmunds-Tucker Act disincorporated the

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[36] Id. at 165-166.
[37] *Murphy v. Ramsey*, 114 U.S. 15 (1885).
[38] *Ex Parte Snow*, 20 U.S. 274 (1887).
[39] *Cannon v. United States*, 116 U.S. 55, 72 (1885) ("[c]ompacts for sexual non-intercourse, easily made and easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates.").

LDS Church. The Act was upheld by the U.S. Supreme Court in *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*.[40] In that case, the Court authorized the escheatment of church property because of the continued practice of polygamy.

When Congress allowed Utah to be admitted as a State, the Enabling Act specified that while religious liberty would be protected "polygamous or plural marriages are forever prohibited."[41]

II. The court below ignored crucial state interests in marriage that amply justify Congress' decision to enact DOMA.

To bolster its conclusion that DOMA violates the U.S. Constitution, the court below referenced a companion case (consolidated here) that held DOMA's definition of marriage in federal statutes violated the Fourteenth Amendment. Other parties will more fully address the serious mistakes in the court's analysis. *Amicus* merely adds that the mistake in the court's analysis of the public interests served by DOMA is similar to the mistake the court made in analyzing the application of the Tenth Amendment to the commonsense exercise of Congress' power to specify the meaning of terms it uses in statutes. In both cases, the court below failed to address relevant precedent that would argue in favor of a result

[40] *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).
[41] Act of July 16, 1894, ch. 138, 28 Stat. 107.

contrary to that reached by the court. Specifically, the court failed to address a body of persuasive precedent from other jurisdictions that found the foremost of the interests advanced by Congress amply justifies retaining the definition of marriage as the union of a man and a woman.

The court below thus notes the interests Congress intended to advance when it enacted DOMA but finds it unpersuasive. Memorandum at 23-27. The court below stated it could "readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation" relying on (1) a government disavowal of this interest, (2) "a consensus . . . among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well adjusted as those raised by heterosexual parents,"[42] (3) a conclusion that "such a denial does nothing to promote stability in heterosexual parenting," and (4) the observation that married couples are not required to have children. Memorandum at 23-24.

These arguments, however, are not relevant to the actual interests Congress sought to advance. In the House Report referenced by the court below, Congress referenced a scholarly report noting "marriage is a relationship which the

[42] The court's statement here is irrelevant to the case at hand since Congress has not asserted that a certain orientation of parents is preferable but rather that, all things being equal, children will benefit by being raised by their own mother and father.

community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair."[43] The Report goes on to say: "That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship."[44]

Far from dismissing these interests, other courts have given them great weight. In holding that New York's marriage law was consistent with the state's constitutional guarantees, the New York Court of Appeals found,

> the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the

[43] House Report 104-664 (July 9, 1996) at http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrpt664.pdf at 13 (quoting *Marriage in America: A Report to the Nation* 10 (Council on Families in America 1995) reprinted in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 303 (David Popenoe, et al., eds, 1996)).
[44] Id. at 14.

> relationships that cause children to be born. It thus could choose to offer an inducement-in the form of marriage and its attendant benefits-to opposite-sex couples who make a solemn, long-term commitment to each other.[45]

The court further said:

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.[46]

The Maryland Court of Appeals similarly noted:

> safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest. The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. . . . This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).[47]

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[45] *Hernandez v. Robles*, 7 N.Y.3d 338, 359,855 N.E.2d 1 (NY 2006).
[46] Id. at 359-360.
[47] *Deane v. Conaway*, 401 Md. 219, 932 A.2d 571, 630-631 (Md. 2007).

To take yet one more example,[48] in an opinion concurring in the Washington Supreme Court's decision that the state's marriage law was constitutional, Justice J.M. Johnson said:

> A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State. Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise.[49]

These excerpts make abundantly clear that the procreation interest noted by Congress is not trivial but rather deserving of greater deference than the court below gave it.

In addition to disregarding persuasive precedents on procreation, the court below also ignored a plausible rationale for Congress' interest in conserving resources.

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[48] *See also Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Indiana App. 2005); *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 995-996 (Mass. 2003) (Justice Cordy dissent).

[49] *Andersen v. King County*, 158 Wash. 2d 1, 138 P.3d 963, 1002 (Wash. 2006) (J.M. Johnson., J. concurring).

The court below said it "could discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage." Memorandum at 26-27. Assuming ill will is not usually the best way of understanding government motives, however. Congress could as easily have recognized that if marriage has nothing to do with a broader social purpose such as fostering responsible procreation, there would be nothing to prevent any two people where one is, for example, dying from cancer to enter a same-sex marriage for the purpose of passing on social security benefits. These would not be sham marriages; they would be based on love but would not likely advance the kinds of interests meant to be furthered by Social Security laws.

The failure of the court below to examine directly relevant precedent in the context of federal regulation of marriage, persuasive precedent in the context of the public's interests in marriage and procreation, and common-sense in Congress' interests in preserving the public treasury fatally compromise its decisions that DOMA is unconstitutional.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Honorable Court reverse the judgment of the district court.

Respectfully submitted,

s/ William C. Duncan

Certificate of Compliance

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word word processing software in 14-point Time New Roman font.

s/ William C. Duncan
William C. Duncan
Counsel for the *Amicus Curiae*

January 19, 2011

Certificate of Service

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Appellate CM/ECF system on January 19, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System.

s/ William C. Duncan

Can We Please Just Start Admitting That We *Do* Actually Want To Indoctrinate Kids?
Daniel Villareal
Queerty.com
http://www.queerty.com/can-we-please-just-start-admitting-that-we-do-actually-want-to-indoctrinate-kids-20110512/

In response to New York's recently introduced marriage equality bill, the so-called National Organization for Marriage got a bunch of pictures of black people and some guy who sounds like Foghorn Leghorn to repeat the same lies about indoctrinating schoolchildren that they ran in 2009. They accuse us of exploiting children and in response we say, "NOOO! We're not gonna make kids learn about homosexuality, we swear! It's not like we're trying to recruit your children or anything." But let's face it—that's a lie. We want educators to teach future generations of children to accept queer sexuality. In fact, our very future depends on it.

The battle over Tennessee's "Don't Say Gay Bill" has made this most apparent. Why would anybody get all up in arms about punishing teachers who mention queers in the classroom unless we wanted teachers to do just that? In response against the bill, FCKH8 hired some little girls to drop F-bombs in their online PSAs and gave out hundreds of "Don't B H8N on the Homos" t-shirts, wristbands, pins and stickers to school children in front of TV cameras. Recruiting children? You bet we are.

Why would we push anti-bullying programs or social studies classes that teach kids about the historical contributions of famous queers unless we wanted to deliberately educate children to accept queer sexuality as normal?

Remember, Prop 8 passed along age lines with the very old voting largely in favor of it. The younger generation doesn't fear homosexuality as much because they're exposed to fags on TV, online, and at school. And I don't know a single lesbian, gay, bisexual, or transgender person who wants that to stop. I for one certainly want tons of school children to learn that it's OK to be gay, that people of the same sex should be allowed to legally marry each other, and that anyone can kiss a person of the same sex without feeling like a freak. And I would very much like for many of these young boys to grow up and start fucking men. I want lots of young ladies to develop into young women who voraciously munch box. I want this just as badly as many parents want their own kids to grow up and rub urinary tracts together to trade proteins and forcefully excrete a baby.

I and a lot of other people want to indoctrinate, recruit, teach, and expose children to queer sexuality AND THERE'S NOTHING WRONG WITH THAT. Hell, our opponents even do the same. Yes, they regularly appeal to parents, older adults, and "values voters" through their advertising but they also provide organizing materials so students so they can challenge queer acceptance on their own "Day of Dialogue." The old Day of Dialogue website even contained a press kit so student organizers could alert the local media to come and cover their campaign. Anti-gay opponents are already unabashedly indoctrinating our children with the church and conservative politicians on their side and they make no bones about it.

Sure, they blow the few instances of parental disagreement over queer education histrionically out of proportion, but we do our opponents an even greater service when we trip all over ourselves promising not to mention queers in front of the kids when in fact we'd love to. And because we hide from this very basic fact and treat it like something to be ashamed of, we end up with watered-down unemotional pleas for equality like New York For Marriage Equality's incredibly weaksauce ad:

Committed, loving relationships! Wedding vows! Until death do us part! We just wanna be able to say "I Do!" Forget the thousands of social benefits that regularly screw over queer people without marriage equality. Forget that marriage equality states have lower rates of queer youth and teen suicide. Forget that not educating our kids about queer issues makes them ignorant, hateful little morons. All that doesn't matter just as long as Mary Jo Kennedy and Jo-Ann Shain can sit on a couch with matching glasses and haircuts and dispassionately discuss semantics.

Do you really think Mary Jo and Jo-Ann are gonna convince a bunch of parents who have just seen NOM's scary ad that schools aren't gonna teach their kids about gay fisting and anal sex? So what if NOM's ad is full of lies and distortions? You know why they keep using those same tired old lies? BECAUSE THEY WORK. And if we plan on responding to scare tactics about indoctinating kids and outlawing religion with polite lesbian discussions about commitment, we've already lost.

How about this? How about we accept that we want kids to think better about queers and then create ads—with tons of verifiable supporting evidence—that just plainly state that denying marriage equality ruins people's lives? That would at least be honest and a heck of a lot more compelling then this fearful mincing we're doing to the tune and delight of our foes.

PS. You can help get New York's marriage bill passed: call legislators, donate cash, or join a phonebank.

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Nos. 10-2204, 10-2207, and 10-2214

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Commonwealth of Massachusetts,
Plaintiff-Appellee,
v.
United States Department of Health and Human Services, *et al.*,
Defendants-Appellants.

Dean Hara,
Plaintiff-Appellee/Cross-Appellant,
Nancy Gill, *et al.*,
Plaintiffs-Appellees,
Keith Toney; Albert Toney, III,
Plaintiffs,
v.
Office of Personnel Management, *et al.*,
Defendants-Appellants/Cross-Appellees,
Hilary Rodham Clinton,
in her official capacity as United States Secretary of State,
Defendant.

Appeals from the United States District Court for the District of Massachusetts
Civil Case Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT (Hon. Joseph L. Tauro)

Brief of *Amici Curiae* U.S. Conference of Catholic Bishops; National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; The Ethics and Religious Liberty Commission of the Southern Baptist Convention; The Lutheran Church-Missouri Synod; The Union of Orthodox Jewish Congregations of America; The Massachusetts Catholic Conference; The Brethren in Christ Church; The Christian and Missionary Alliance; The Conservative Congregational Christian Conference; The Evangelical Free Church of America; The Evangelical Presbyterian Church; The International Church of the Foursquare Gospel; The International Pentecostal Holiness Church; The Missionary Church; Open Bible Churches [USA]; The United Brethren in Christ Church; The Wesleyan Church
In Support of Defendants-Appellants and in Support of Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record identifies the following corporate relationships with respect to each *amicus curiae*:

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The Wesleyan Church is a nonprofit corporation that has no parent corporation and issues no stock.

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January 27, 2011

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STATEMENT OF INTEREST OF THE *AMICI*[1]

The voices of tens of millions of Americans are represented in the broad cross-section of faith communities that join in this brief. Our theological perspectives, though often differing, converge to support the proposition that the traditional, opposite-sex definition of marriage in the civil law is not only constitutional but vital to the welfare of families, children and society. Faith communities have the deepest interest in the legal definition of marriage and in the stability and vitality of that time-honored institution. Our traditions and teachings explain, define, support, and sustain the institution of marriage, both religiously and socially. We seek to be heard—with basic fairness and accuracy—in the democratic and judicial forums where the fate of that foundational institution will be decided. Statements of interest of the individual *amici* may be found in the addendum to this brief.

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[1] This brief is filed with the written consent of all parties. *See* FED. R. APP. P. 29(a). No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

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INTRODUCTION

With the overwhelming support of the American people, the Congress of the United States enacted, and the President signed, the Defense of Marriage Act ("DOMA") to preserve the traditional definition of marriage in federal law. DOMA does not disturb state-law definitions of marriage or trench on state prerogatives over domestic relations. Indeed, one of DOMA's primary purposes (in a provision not at issue here) is to preserve the authority of each state to determine for itself the definition of marriage. Nevertheless, Congress properly has a voice in the great national debate over same-sex marriage. Although it cannot define marriage for state-law purposes, Congress certainly has the authority to define its meaning for purposes of federal law and, in so doing, to express its considered judgment about how marriage should be ordered to achieve its vital social ends. DOMA does just that.

As a statute subject to rational-basis review, DOMA is entitled to broad deference and respect from the federal courts. That standard does not allow the judiciary to second-guess Congress's moral and majoritarian judgment on a public policy matter of such fundamental importance. Yet in substance, that is precisely what the district court did. It invalidated DOMA as if it were nothing more than raw, anti-homosexual bigotry. That is inaccurate and unfair. To be sure, a few

members of Congress spoke harshly in the debate leading up to the vote. Like most, we reject any effort to disparage gays and lesbians. But the intemperate expressions of a few cannot vitiate the numerous rational bases supporting Congress's judgment that the traditional definition of marriage be preserved in federal law.

As set forth below, social science, common sense and the vast experience of these *amici* in family matters support Congress's conclusion that marriage, defined as the union of one man and one woman, is closely tied to the welfare of children, the well-being of the family, and the health of the nation. Our understanding is based not only on the teachings of our respective faith traditions, but on carefully reasoned judgments about the nature and needs of individuals (especially children) and society, and on literally millions of hours of counseling and ministry. As we affirm the dignity of homosexual persons and condemn anti-gay bigotry, we urge this Court to uphold the constitutionality of Congress's decision to preserve the traditional definition of marriage in federal law.

ARGUMENT

I. THE UNITED MORAL JUDGMENT OF CONGRESS AND THE PRESIDENT IN RETAINING THE TRADITIONAL DEFINITION OF MARRIAGE FOR FEDERAL LAW IS ENTITLED TO BROAD JUDICIAL DEFERENCE.

The central issue in this appeal is whether section 3 of the Defense of Marriage Act ("DOMA")[2] satisfies rational-basis review under the Fifth Amendment.[3] Codified at 1 U.S.C. § 7, section 3 of DOMA does nothing more than formally adopt the age-old definition of the word "marriage" for federal law:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

Even 25 years ago this provision would have been so self-evident as to be superfluous. But that changed as the great democratic debate over same-sex

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[2] Textual references to "DOMA" should be understood as "DOMA section 3."

[3] We do not address the district court's tenuous Spending Clause and Tenth Amendment holdings, except to agree with the United States that the district court's holding on these grounds is without merit. *See* Brief for the United States Department of Health and Human Servs., et al., *Commonwealth of Mass. v. United States Dep't of Health and Human Servs.* (Jan. 13, 2011) (Nos. 10-2204, 10-2207, and 10-2214), at 55-62 ("United States Brief").

marriage got underway in the 1990s and some began challenging the cultural and legal definition of marriage. In response, Congress enacted DOMA.

DOMA is a mere rule of interpretation specifying what Congress intends by the word "marriage" in its own statutes and in the rules and regulations of federal agencies. It does not regulate marriage itself or disturb state definitions of marriage. On the contrary, a key purpose of DOMA—both section 7 and its other provisions—is to ensure that states remain free to set their own marriage policies while also ensuring that no state may unilaterally define marriage for a sister state or for the federal government. *See, e.g.*, H.R. Rep. 104-664, at 6-10 (1996) ("House Report").

As a definition intended to control the interpretation of federal law *en masse*, DOMA is unremarkable. It resembles the definitions of the Dictionary Act, *see* 1 U.S.C. § 1, that the Supreme Court has followed carefully to ensure adherence to congressional intent. *See, e.g., Rowland v. California Men's Colony*, 506 U.S. 194, 199-201 (1993) (determining whether "person" includes associations).

A. The Controlling Rational-Basis Standard Entitles DOMA to Maximum Judicial Deference.

Plaintiffs' attack on DOMA merits only rational-basis review. DOMA neither infringes a fundamental right nor discriminates against a suspect class and thus must be accorded the broadest judicial deference. *See Heller v. Doe*, 509 U.S.

312, 319-320 (1993). Every appellate court decision, both state and federal, to address the validity of traditional opposite-sex marriage laws under the federal Constitution has reviewed (and upheld) them under rational-basis review. *See, e.g., Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *see also Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing appeal seeking to establish right of same-sex marriage for want of a substantial federal question).

When attacking an act of Congress, the hurdle of rational-basis review is almost insurmountable. That standard is a "paradigm of judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), that forbids "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations," *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). It presumes legislation is valid and burdens the plaintiff with eliminating every conceivable rational reason—whether Congress thought of it or not—that might support it. *Beach Commc'ns*, 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'") (citation omitted).

Contrary to the court below, the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), did nothing to change the standard in cases

challenging the traditional definition of marriage. As this Court recently held, "*Lawrence* did not identify a protected liberty interest in all forms and manner of sexual intimacy. ***Lawrence* recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one's home and one's own private life.**" *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (citing *Lawrence*, 539 U.S. at 567) (emphasis added). *Lawrence* did not recognize either a fundamental right to same-sex marriage or a right to federal recognition of a state-sanctioned same-sex marriage. Likewise, this Court has joined with its "sister circuits in declining to read [the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996)] as recognizing homosexuals as a suspect class for equal protection purposes." *Id.* at 61.

DOMA also merits special deference because of its subject matter. This is no mere commercial legislation adjusting the benefits and burdens of economic life following the ordinary horse trading of congressional legislation. DOMA reflects the united judgment of Congress and the President on a matter of basic public policy. It was enacted by an overwhelming, bipartisan majority of 85 votes in the Senate and 342 votes in the House of Representatives.[4] Not only did President

[4] *See* official online vote counts in the Senate and House, *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280; http://clerk.house.gov/evs/1996/roll316.xml.

Clinton sign DOMA into law,[5] but the U.S. Department of Justice twice opined that DOMA is constitutional.[6] The Supreme Court has instructed that "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Clinton v. City of New York*, 524 U.S. 417, 447 n.42 (1995) (citation omitted). DOMA is entitled to judicial respect because it fits this description exactly.

DOMA likewise merits deference because it reflects Congress's fact-finding authority. Congressional findings are accorded deference, both because of Congress's greater institutional competence with regard to fact-finding in areas of public policy and "out of respect for its authority to exercise the legislative power … lest [courts] infringe on traditional legislative authority." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997); *see* U.S. Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

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[5] Statement on Same-Gender Marriage, 2 Pub. Papers 1635 (Sep. 20, 1996).

[6] Letter from Andrew Fois, Asst. Attorney General, to Rep. Henry J. Hyde, May 14, 1996 ("The Department of Justice believes that H.R. 3396 would be sustained as constitutional …."), *reprinted in* House Report at 34; Letter from Ann M. Harkins, for Andrew Fois, Asst. Attorney General, to Rep. Charles T. Canady, May 29, 1996 ("The Administration continues to believe that H.R. 3396 would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department."), *reprinted in id.*

Congress's finding that "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing" is thus entitled to deference. House Report at 13.

Given the breadth of deference due, it is little wonder that federal courts rarely strike down acts of Congress under rational-basis review. It appears that not since *Jimenez v. Weinberger*, 417 U.S. 628 (1974), has the Supreme Court done so. Nothing about DOMA makes it a candidate to join this small and discredited category of laws.

B. The District Court Erred in Rejecting DOMA Because It Reflects Moral Judgments Regarding Traditional Marriage.

The district court's dismissive opinion evinces none of the judicial respect due congressional legislation under rational-basis review. The court brushed aside Congress's concerns and policy judgments about the importance of sustaining traditional marriage, as if recent support for the novel experiment of same-sex marriage were self-evidently correct and any opposition bespoke animus against homosexuals. It even gave short shrift to the Administration's (unduly) narrow defense of DOMA as a way of maintaining an orderly status quo at the federal level while marriage law at the state level evolves.

The district court's misapplication of the rational-basis test arose from two erroneous propositions: (1) that under rational-basis review "the Constitution [does not] allow Congress to sustain DOMA by reference to the objective of defending traditional notions of morality," Doc. 70, at 26; *see also id.* at 26 n.114, and (2) that DOMA was in fact based solely on traditional morality. The second proposition is wrong as a factual matter, as demonstrated in Part II below, while the first rests on a misreading of the Supreme Court's decisions in *Lawrence* and *Romer* that contradicts this Court's extensive review of those opinions in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008).

The district court's holding that morality cannot be the primary basis for legislation under rational-basis review is simply incorrect. As this Court noted while parsing *Lawrence* and *Romer*, "[i]t is well established that a 'legislature [can] legitimately act ... to protect the societal interest in order and morality.'" *Id.* at 52 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991)).

In *Cook*, this Court explained that "if *Lawrence* had applied traditional rational basis review" to the Texas law criminalizing homosexual sodomy, then "the convictions under the Texas statute would have been sustained" because under rational-basis review the "governmental interest in prohibiting immoral conduct" is sufficient. 528 F.3d at 52. "Thus, *Lawrence*'s holding can only be squared with

the Supreme Court's acknowledgment of morality as a rational basis by concluding that a protected liberty interest was at stake, and therefore a rational basis for the law was not sufficient." *Id.* at 53. This Court carefully described that "protected liberty interest" as "adult consensual sexual intimacy in the confines of one's home and one's own private life." *Id.* at 56. In short, *Lawrence* guarantees some heightened protection (how much is unclear, *see id.* at 52) against governmental regulation of "private, consensual sexual intimacy." *Id.* But it does not call into question governmental protection or promotion of morality as an appropriate basis of legislation under rational-basis review. And *Lawrence* specifically disclaimed any effort to extend its reasoning to governmental recognition of same-sex relationships. *Lawrence*, 539 U.S. at 578 (the Court's decision did "not involve whether the government must give formal recognition to any relationship that homosexual persons may seek to enter").

This Court's reading of *Romer* was similarly narrow and demonstrates that *Romer* does not undermine Congress's ability to pass legislation based on traditional morality:

> The ground for decision [in *Romer*] was the notion that where "a law is challenged as a denial of equal protection, and all that the government can come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared, ... it is difficult to argue that the law is rational if 'rational' in

> this setting is to mean anything more than democratic preference." *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir.1998) (Posner, J.).

Cook, 528 F.3d at 61. The Supreme Court construed the law in *Romer* as rendering homosexuals "a stranger" to Colorado's laws by withdrawing from them "specific legal protection from the injuries caused by discrimination" and "impos[ing] a special disability" on them when seeking such protection. *Romer*, 517 U.S. at 635, 627, 631. The Court found the law alien to our democratic system and that it could be explained only by irrational, anti-homosexual animus. But like *Lawrence*, *Romer* had nothing to do with officially recognizing, reinforcing, or subsidizing same-sex relationships, or with the general validity of moral precepts as a basis for legislation. And in contrast with the unprecedented citizens' initiative in *Romer*, laws limiting marriage to the traditional definition were, until recently, ubiquitous and remain the norm in the United States. The district court's selective quotations from *Lawrence* and *Romer* do not justify its cavalier rejection of Congress's interest in "defending traditional notions of morality." House Report at 33. Neither case remotely suggests that legislation is invalid or even suspect if, like DOMA, it rests in part on moral premises.

Indeed, the very notion is absurd. Nearly all legislation involves moral judgments. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[c]onflicting claims of morality and intelligence are raised by opponents and proponents of

almost every [legislative] measure."). The great legislative debates of the past century—from business and labor regulations, to civil rights legislation, to environmentalism, to military spending, to universal health care, etc.—centered on contested questions of morality. The same is true of our current democratic conversation about the definition and purpose of marriage, which the Supreme Court long ago recognized as having "more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). DOMA is not subject to greater scrutiny merely because it was strongly influenced by moral judgments that some deem wrong. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (Kennedy, J.) ("Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.").

Striking down DOMA would not remove morality from the marriage debate. But it would disenfranchise millions of Americans who take one side of that debate while privileging those with the opposing view. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) (recognizing deeply held views on marriage). DOMA cannot be constitutionally suspect merely because the traditional definition of marriage finds support in certain religious beliefs. *See McGowan v. Maryland*, 366 U.S. 420, 442 (1961). As the Supreme Court explained, "[t]hat the Judaeo-

Christian religions oppose stealing does not mean that a State or the Federal Government may not … enact laws prohibiting larceny." *Harris v. McRae*, 448 U.S. 297, 319 (1980). It is no more objectionable for people of faith and their elected representatives to be influenced by their deeply held religious and moral beliefs when making decisions about important matters of public policy than for others to rely on their deeply held secular beliefs. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment) ("Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally.").

In its haste to repudiate traditional morality as a rational basis for DOMA, the district court missed an additional reason for sustaining DOMA on morality-related grounds. DOMA may be viewed as a form of governmental speech that expresses and affirms the traditional conception of marriage. "A government entity has the right to 'speak for itself' and is 'entitled to say what it wishes.'" *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (citations omitted). The government's authority to deliver its own message permits it to "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995) (discussing *Rust v. Sullivan*, 500 U.S. 173, 196-200 (1991)).

Viewed from this perspective, DOMA serves to maintain the integrity of the federal government's message of support for the traditional marital union. Congress could reasonably conclude that the ability of marriage to promote responsible procreation and child rearing—an unquestionably legitimate governmental interest—has some rational relationship to the legal definition of marriage as a man-woman union. For tens of millions of Americans, the very idea and power of marriage—and a core reason it remains a compelling institution—are inextricably linked to its association with the love of a man and a woman. Replacing the established definition with the genderless idea of "any two committed adults"—one that treats gender and any possibility of reproduction as irrelevant or not central to marriage—would profoundly disrupt the government's message and weaken its power to promote vital social ends. It would place the imprimatur of the federal government on a conception of marriage that Congress does not intend to reinforce or privilege. DOMA serves the legitimate governmental purpose of protecting from distortion (particularly by potential variations in state law) Congress's long-standing message that the union of a man and a woman is the primary building block of society.

At the end of the day, properly applying the rational-basis standard is about giving the democratic and political processes adequate breathing room.

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> Time and again ... [the Supreme Court] has made clear in the rational-basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Nordlinger v. Hahn, 505 U.S. 1, 17-18 (1992) (citation omitted). Until the national democratic conversation on the meaning of marriage is resolved through the many political and social processes now at work in the states and in the federal government, this Court should allow "this debate to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

II. SECULAR AND RELIGIOUS AUTHORITIES FURNISH NUMEROUS RATIONAL GROUNDS FOR DOMA'S DEFINITION OF MARRIAGE.

A. Secular Authorities Affirm the Government's Legitimate Interests in Supporting Traditional Marriage.

When enacting DOMA, Congress explained the profound interest society has in preserving traditional marriage:

> At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child rearing. Simply put, government has an interest in marriage because it has an interest in children.

House Report at 13. Congress thus identified "responsible procreation and child rearing" as a legitimate interest served by DOMA. Although the Administration shies away from defending DOMA on this ground, *see* United States Brief at 29, it

nonetheless merits this Court's full consideration.

Congress's judgment that traditional marriage protects children is supported by a long line of eminent thinkers and scholars from relevant academic fields over the past three centuries. *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 78 (Peter Laslett ed., 1988) (1690) (the purpose of marriage is "the continuation of the species" and "this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones … who are to be sustained by those that got them, till they are able to shift and provide for themselves."); WILLIAM BLACKSTONE, 1 COMMENTARIES *422 (marriage is "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated" and the parent-child relationship is "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (marriage "was instituted … for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children"); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF

MARRIAGE & DIVORCE § 39 (1852) ("The husband is under obligation to support his wife; so is he to support his children. The obligation in neither case is one of contract, but of law. The relation of parent and child equally with that of husband and wife, from which the former relation proceeds, is a civil status."); BERTRAND RUSSELL, MARRIAGE & MORALS 77, 156 (Liveright Paperbound Ed., 1970) ("But for children, there would be no need for any institution concerned with sex.... [For] it is through children alone that sexual relations become of importance to society."); BRONISLAW MALINOWSKI, SEX, CULTURE, AND MYTH 11 (1962) ("[T]he institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents ...."); G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); W. BRADFORD WILCOX, ET AL., EDS., WITY MARRIAGE MATTERS 15 (2d ed. 2005) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society.").

This long-prevailing view of marriage was aptly summarized by the

preeminent sociologist Kingsley Davis: "The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring." *The Meaning & Significance of Marriage in Contemporary Society* 7-8, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis, ed. 1985).

Social science has confirmed the common-sense, cultural understanding that children benefit when they are raised in a stable family by the biological couple who brought them into this world.[7] "[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." KRISTEN ANDERSON MOORE, ET AL., MARRIAGE FROM A CHILD'S PERSPECTIVE, CHILD TRENDS RESEARCH BRIEF 6 (June 2002). These benefits appear to flow in substantial part from the biological connection shared by a child with both his mother and father. *See id.* at 1-2 ("[I]t is not simply the presence of two parents, … but the presence of *two biological parents* that seems to support children's development.").

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[7] Although the Administration cites a few studies for its view that "children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents," United States Brief at 29-30 (footnote omitted), those studies do not reflect a professional consensus—as demonstrated by the authorities we discuss herein.

Research rebuts the suggestion that either fathers or mothers are unnecessary for effective childrearing. "[T]here are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself." Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 SOC'Y 27 (2004). Other experts agree. *See, e.g.*, DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD & MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN & SOCIETY 146 (1996) ("The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."); JAMES Q. WILSON, THE MARRIAGE PROBLEM 169 (2002) ("The weight of scientific evidence seems clearly to support the view that fathers matter.").

Conversely, when procreation and child-rearing take place outside stable, biological family units, children may suffer:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children. There is thus value for children in promoting strong, stable marriages

between biological parents.

MOORE, MARRIAGE FROM A CHILD'S PERSPECTIVE, at 6.

Upsetting the settled definition of marriage by adopting an untested genderless definition carries risks for children parented by same-sex couples. A diverse group of 70 prominent scholars recently concluded that "no one can definitively say at this point how children are being affected by being reared by same-sex couples." WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 18 (2008). Given what we know about the adverse effects of fatherless parenting, encouraging more same-sex parenting may well increase negative outcomes for increasingly large numbers of children.

More broadly, altering the definition of marriage threatens to dilute its power to carry out its vital social function. Traditional marriage is much more than a legal construct. It embodies a rich set of social, cultural, and (for most) religious understandings and images that serve to channel procreative heterosexual couples into enduring marital unions for the benefit of children, among other reasons. *See* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992). There is no evidence that widespread adoption of a genderless definition of marriage would have that same power. In the wake of changes like

the sexual revolution and no-fault divorce, no one can deny that social and legal incentives are closely linked to child welfare.

Whether Congress had these precise considerations in mind when enacting DOMA is irrelevant. The weight of these secular authorities prevents the Plaintiffs-Appellees from meeting their heavy burden "'to negative ***every*** conceivable basis which might support [DOMA].'" *Beach Commc'ns*, 508 U.S. at 315 (emphasis added). One cannot fairly say that the statute lacks "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313.

B. Based on Long Experience Serving Families and Individuals, Our Religious Communities Have Numerous Secular Reasons to Support the Traditional Definition of Marriage.

Although our faith communities have embedded marriage in rich religious narratives, our support for traditional marriage is not based on exclusively spiritual grounds.[8] We have numerous secular and empirical reasons for supporting the

[8] Some have sought to dismiss the perspectives of faith communities as improper because they are informed by religious beliefs. *See* Margaret Somerville, *What About Children?*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 70-71 (2004) ("One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a society level."). These *amici* indeed

traditional definition of marriage. Our own long experience confirms that children fare best when raised by caring biological parents who have the biggest stake in their well-being and who can provide both male and female role models. We are concerned about the happiness and welfare of our members, especially our member children. Through millions of hours of counseling and other ministry over literally centuries, we have seen at close range the enormous benefits that traditional male-female marriage imparts. We have also witnessed the substantial adverse consequences for children, parents, and civil society that often flow from alternative household arrangements. For these *amici*, such effects are not impersonal statistics. Our faith communities are intimately familiar with the personal tragedies so often associated with fatherless and motherless parenting and family disintegration.

As religious institutions, we also uniquely understand the power of symbols, words, and definitions. Law is a civics teacher. *See generally* MARY ANN

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assign religious meanings to marriage, and it is constitutionally appropriate that religious viewpoints be heard in public policy debates. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 670 (1970) ("Of course, churches as much as secular bodies and private citizens have [the] right [to take positions on public issues]."). But *amici's* support for DOMA is not only about religious belief. Our submission is rooted in historical and sociological facts about what marriage has always been across time and cultures (and why), and on venerable legal doctrines that caution against courts removing fundamental policy decisions from the democratic process. Our arguments, in short, are based on public reasons and political values implicit in our political culture.

GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 7-8 (1987) ("[L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things."). Those who advocate same-sex marriage seek to replace the male-female definition of marriage with a genderless definition. That momentous change in its nature and symbolism would have profound consequences. It would transform the official meaning, imagery, and purpose of marriage from an age-old institution centered on uniting men and women for the bearing and rearing of children to a new institution centered on affirming and facilitating intimate adult relationships. Lost will be the social understanding that marriage is special because of the children it often generates and because it provides those children with the mother and father they need for optimal childhood development. Whatever the choices of individual couples, children will no longer be central to the purpose and meaning of marriage. The powerful imagery of marriage will change as two adults, regardless of gender, occupy center stage, rather than exclusively a man and a woman. Profound and intractable tensions will arise between civil and religious understandings of marriage, fracturing a centuries-old consensus and turning what is now a point of social unity into a source of conflict.

Whether or not one agrees with such changes, and others we cannot know from our current vantage point, one cannot pretend they will not occur if marriage is redefined or that they don't matter:

> One may see these kinds of social consequences of legal change as good, or as questionable, or as both. But to argue that these kinds of cultural effects of law do not exist, and need not be taken into account when contemplating major changes in family law, is to demonstrate a fundamental lack of intellectual seriousness about the power of law in American society.

INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 26 (2006). The question is, who decides? In a representative democracy, that authority lies with the political branches, not the judiciary.

For all these reasons, Congress's policy decision to reinforce the long-standing definition of marriage through the modest means of DOMA is eminently reasonable and entitled to this Court's deference.

III. SUPPORT FOR TRADITIONAL MARRIAGE CANNOT BE REDUCED TO ANIMUS AGAINST HOMOSEXUALS.

A. Our Religious Communities Cherish Rich Beliefs About the Virtues of Traditional Marriage Distinct from Beliefs About Homosexuality.

We close with important clarifications. The district court ruled that "it is only irrational prejudice that motivates" DOMA's definition of marriage. Doc. 70, at 38. That is simply untrue. As supporters of DOMA, our deepest convictions about marriage are quite distinct from our beliefs concerning homosexuality, and it

is false and unfair to marginalize those convictions by portraying them as "irrational prejudice."

Our faith communities and other religious organizations have a long and vibrant history of upholding traditional marriage for reasons that have little to do with homosexuality. Indeed, our support for traditional marriage precedes by centuries the very notion of homosexuality as a recognized sexual orientation, not to mention the recent movement for same-sex marriage. Many of this nation's prominent faith traditions have rich religious narratives that describe and extol the personal, familial, and social virtues of traditional marriage while mentioning homosexuality barely, if at all. A few examples illustrate the point.

The Catholic Tradition. In the Catholic faith, marriage is at once profoundly spiritual—personally instituted as a sacrament by Jesus Christ himself—and yet also indispensable to the good of society. *See Catechism of the Catholic Church* (2d ed. 1994) (hereafter "*Catechism*"), §1601. "The well-being of the individual person and of both human and Christian society is closely bound up with the healthy state of conjugal and family life." *Id.*

The Catholic bishops of the United States recently reaffirmed some of the benefits of the time-tested understanding of marriage in a pastoral letter:

> Marriage is not merely a private institution, however. It is the foundation for the family, where children learn the values and virtues

> that will make good Christians as well as good citizens. The importance of marriage for children and for the upbringing of the next generation highlights the importance of marriage for all society.

Pastoral Letter, "Marriage: Love and Life in the Divine Plan" (Nov. 17, 2009) 7-8 ("Pastoral Letter"), *available at* http://www.usccb.org/loveandlife/Marriage FINAL.pdf.

The Catholic Church teaches that marriage is oriented toward two fundamental purposes: namely, the good of the spouses and the procreation of children. Pastoral Letter, at 11. When joined in marriage, a man and woman uniquely complement one another spiritually, emotionally, psychologically, and physically. The sexual difference of husband and wife makes it possible for them to unite in a one-flesh union capable of participating in God's creative action through the generation of new human life. *Id.*

The Evangelical Protestant Tradition. For five centuries the various denominational voices of Protestantism have taught marriage from a biblical view focused on uniting a man and woman in a divinely sanctioned companionship for the procreation and rearing of children. A contemporary biblical commentary, widely used by Evangelical Protestants, teaches that marriage is a social institution of divine origin:

> Marriage is the fundamental institution of all human society. It was established by God at creation, when God created the first human

> beings as "male and female" (Gen. 1:27) and then said to them, "Be fruitful and multiply and fill the earth" (Gen. 1:28).
>
> . . . .
>
> Some kind of public commitment is also necessary to a marriage, for a society must know to treat a couple as married and not as single. . . .
>
> Both Genesis 2:24 and Matthew 19:5 view the "one flesh" unity that occurs [*i.e.*, consummation] as an essential part of the marriage.

ESV [English Standard Version] Study Bible 2543-44 (2008).

A distinguished Evangelical scholar recently wrote that marriage is "a sacred bond between a man and a woman, instituted by and publicly entered into before God" and "characterized by permanence, sacredness, intimacy, mutuality, and exclusiveness." ANDREAS J. KOSTENBERGER, GOD, MARRIAGE, AND FAMILY: REBUILDING THE BIBLICAL FOUNDATION 272-73 (2004).

The Latter-day Saint (Mormon) Tradition. Marriage and the family (understood as husband, wife, and children) are central to the beliefs of The Church of Jesus Christ of Latter-day Saints. In 1995, the Church issued a formal doctrinal proclamation on marriage and the family declaring that:

> [M]arriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children .... Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity.

The Family: A Proclamation to the World (Sept. 23, 1995) (hereafter "*Family Proclamation*"), available at http://www.lds.org/library/ display/0,4945,161-1-11-1,00.html. The *Family Proclamation* emphasizes the tie between marriage and the rearing of children:

> Husband and wife have a solemn responsibility to love and care for each other and for their children. . . . Parents have a sacred duty to rear their children in love and righteousness, to provide for their physical and spiritual needs, and to teach them to love and serve one another, observe the commandments of God, and be law-abiding citizens wherever they live.

Id. It deems the traditional family "the fundamental unit of society." *Id.*

The Jewish Tradition. Judaism recognizes marriage as a fundamental human institution and affirms marriage only between a man and woman. Judaism recognizes the central role of the two-parent, mother-father led family as the vital institution in shaping the entire human race. Thus, the opening passages of the Torah teach us that the human race was created in the pair of Adam and Eve and they were charged to "be fruitful" and populate the earth. Genesis 1:27-28. The Torah further teaches that "man is to leave his father and mother and cleave to his wife, and become one flesh." Genesis 2:24.

Within the Jewish people, the two-parent marriage is a model not only for human relations but for relations with the Divine. Babylonian Talmud, Tractate Kiddushin, 30b. The Almighty Himself is seen as being a third partner to the

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father-mother configuration (*id.*), and the central role of the family, unless circumstances make it impossible, is to conceive and raise children, thereby perpetuating the human race and for Jews, ensuring the continuity of the Jewish people.

Judaism recognizes marriage as a sanctified institution—such that the term for the marriage ceremony is *Kiddushin*—literally: "holiness"—and the marriage vow stated under the wedding canopy is "behold you are *mekudeshet*, 'holy,' to me." Undermining this ancient and holy institution is at odds with the Jewish tradition.

These religious understandings of marriage are rooted in beliefs about God's will concerning men, women, children, and society, rather than in the narrow issue of homosexuality. Religious teachings may indeed address homosexuality and other departures from the marriage norm, but such issues are secondary and at the margins of religious discourse on marriage.

B. Our Religious Communities Preach Love for, Not Hostility Toward, Our Homosexual Neighbors.

Lastly, whatever the failings (past or present) of particular individuals within our religious communities, we are united in condemning hatred and mistreatment of homosexuals. We believe that God calls us to love homosexual persons, even as we steadfastly defend our belief that traditional marriage is both divinely ordained

and experientially best for families and society. This considered judgment is informed by our moral reasoning, our religious convictions, and our long experience counseling and ministering to adults and children. The district court's ruling that, in enacting DOMA, Congress could only have been motivated by bigotry against homosexuals—and, hence, by implication, that our own support for DOMA and traditional marriage is so motivated—is inaccurate and unfair.

CONCLUSION

DOMA should be upheld and the decision below reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief of *Amici Curiae* has been produced using the proportional font 14-point Times New Roman. I also certify that this brief contains 6,931 words, as calculated by Microsoft Word 2007, in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

/s Anthony R. Picarello, Jr.
Anthony R. Picarello, Jr.
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January 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on January 27, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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January 27, 2011

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ADDENDUM—STATEMENTS OF INTEREST OF THE *AMICI*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the promotion and protection of marriage.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that biblical marriage is instituted by God, and that the government does not create marriage but is charged to protect it. NAE is grateful for the American legal tradition safeguarding biblical marriage, and believes that this jurisprudential heritage should be maintained in this case.

The Church of Jesus Christ of Latter-day Saints ("LDS Church") is a Christian denomination with approximately 14 million members worldwide. Marriage and the family are central to the LDS Church and its members. The LDS

Church teaches that marriage between a man and a woman is ordained of God, that the traditional family is the foundation of society, and that marriage and family supply the crucial relationships through which parents and children acquire private and public virtue. Out of support for these fundamental beliefs, the LDS Church appears in this case to defend the traditional definition of marriage as embodied in the federal Defense of Marriage Act.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 44,000 churches and 16.3 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as marriage and family, the sanctity of human life, ethics, and religious liberty. Marriage is a crucial social institution. As such, we seek to strengthen and protect it for the benefit of all.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2,400,000 baptized members. The Synod believes that marriage is a sacred union of one man and one woman (Gen. 2:24-25), and that God gave marriage as a picture of the relationship between Christ and His bride the Church (Eph. 5:32). As a Christian body in this country, the Synod

believes it has the duty and responsibility to speak publicly in support of traditional marriage and to protect marriage as a divinely created relationship between one man and one woman.

The Union of Orthodox Jewish Congregations of America is the largest Orthodox Jewish umbrella organization in the United States, representing nearly 1,000 synagogues. Through its Institute for Public Affairs, the Union regularly participates in court cases, typically through *amicus* briefs, to protect the interests and values of the Orthodox community. The American Orthodox Jewish community has a keen interest in ensuring the traditional definition of marriage is preserved for the sake of American families as well as the religious liberty interests of America's faith institutions. As will be elaborated further below, the American Orthodox Jewish community's values – rooted in the Torah – compel us to contend that the traditional definition of marriage be preserved.

The Massachusetts Catholic Conference is the public policy office for the Roman Catholic Church in the Commonwealth, governed by the Ordinary Bishops of the Archdiocese of Boston and the Dioceses of Fall River, Springfield and Worcester. The Massachusetts Catholic Conference advocates the Roman Catholic Church's social justice teaching as applied to public policy issues being debated in the state legislature and courts. The Bishops have consistently spoken out in favor

of maintaining the traditional definition of marriage as the union between one man and one woman.

The Brethren in Christ Church originated in 1778 in Lancaster County, Pennsylvania, and has over 300 congregations across the United States and Canada. We believe the Bible is God's message of salvation for all people, and as believers we accept the Bible as the final authority for faith and practice. It is our commitment to Biblical teaching that leads to our strong affirmation of marriage as a union of a man and a woman in a lifelong commitment of love and fidelity. We believe that society benefits when this traditional understanding of marriage is upheld and supported.

The Christian and Missionary Alliance **("C&MA")** is an evangelical denomination established in 1897 with a major emphasis on world evangelization. As of 2009, the C&MA had 2,021 churches in the 50 states of the United States, Puerto Rico and the Bahamas with approximately 432,000 members and adherents and 4,000 active official workers. The C&MA believes that marriage between a man and a woman is an essential, sacred institution, a cornerstone of society. It was established by God Himself when "the Lord said, It is not good that the man should be alone; I will make an help meet for him" (Genesis 2:18), and marriage has enjoyed divine sanction and blessing across the centuries. Ephesians 5 reveals

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the sacredness of marriage when the union between Christ and the Church is used to illustrate the husband-wife relationship.

The Conservative Congregational Christian Conference ("CCCC") is a theologically conservative denomination that was formally organized in 1948, now with over 300 churches and 800 ministers who are followers of the Lord Jesus Christ. Our various member churches were begun in the 17th through the 21st centuries, and we are committed to living according to the truth revealed in the Bible which we regard as the infallible Word of God. One of our position papers thus declares this conviction concerning marriage: "*God instituted marriage. It is not subject to the changing norms of society. God designed marriage to be a permanent union of a man and woman by which they are made one.*"

The Evangelical Free Church of America ("EFCA") consists of 1,500 churches and church plants with approximately 350,000 participants. As Evangelicals, we are committed to the proclamation of the Gospel, the good news of Jesus Christ, and to the Scriptures as being the inspired, inerrant, authoritative and sufficient Word of God. EFCA churches are united by a mutual commitment to serve our Lord Jesus Christ under the guidance of the Holy Spirit and obedience to the Word of God. The ministry of the EFCA currently extends to 75 countries of the world. We believe that God first created man and then created woman, from

the man, as a complement to the man. God established marriage as a one-flesh union between the man and the woman, the husband and the wife. As ordained by God, this covenantal relationship known as marriage is the union of a man and woman-husband and wife that is life-long (permanent, i.e. until separated by death), exclusive (monogamy and fidelity), and generative which is fulfilled by bearing and rearing children together (be fruitful and multiply). Marriage is the original and most important institution of human society, and the one on which all other human institutions have their foundation. Because God is good and his design for marriage is good, and because this is the foundation of human and societal flourishing, we strongly affirm the one-flesh union of husband and wife which serves the good of children, the good of spouses, and the common good of society.

The Evangelical Presbyterian Church is a growing denomination of 297 churches representing over 720 credentialed ministers and 113,000 members. As a reformed and evangelical body we are strongly committed to the authority and teaching of the Bible, God's Word. We believe that God has revealed to all people in all cultures at all times a sense of morality in the ordering of human relationships. For this reason, there is a moral imperative which governs all human relationships, including marriage. The EPC unambiguously affirms that marriage

is a covenant between one man and one woman and between the participants and God (Malachi 2:14-16). It is a gift from God for the blessing of men, women and children and for the good of society, and is therefore, the fundamental institution of society. Protecting and encouraging this fundamental institution is of the highest importance for the welfare and benefit of all.

The International Church of the Foursquare Gospel is a Christian denomination that traces its founding to the inspired work of Aimee Semple McPherson beginning in Los Angeles in 1923. As a hierarchical church, the Foursquare Church has approximately 262,000 members and organized into 14 districts across the U.S. The Foursquare Church has more than 64,000 churches and meeting places around the world. Its 1,865 U.S. churches are served by over 6,800 pastors called to ministry by the Foursquare Church.

According to the doctrine and practices of the Foursquare Church, marriage is an ordinance to govern relations between men and women first instituted by our Creator. The institution of marriage was honored by Christ and clear teaching for the health and preservation of marriage between men and women was a part of the teachings of the first apostles of the Gospel, including the instruction that the relationship between a husband and wife at its best is a picture of the relationship between Christ and the church. Thus, the Foursquare Church has a vested interest

in fostering healthy marriages among men and women. The Foursquare Church views the traditional definition of "marriage" in the law as a bulwark in the societal understanding of healthy human relationships.

The International Pentecostal Holiness Church is a classical, pentecostal denomination originating in 1898 and incorporating in the state of North Carolina in 1911. From its humble beginnings, the denomination today numbers 4.1 million members, with over 18,000 congregations and 23,000 ministers residing in 103 countries around the world. The denomination is present in 45 states in the United States. Its ministry includes grade schools, Bible Colleges, Liberal Arts Colleges, a Graduate School, medical aid stations, orphanages, child adoption programs, military and institutional chaplaincies, as well as many other social outreach functions. The IPHC operates with elements of both congregational and episcopal government, being led by a Presiding Bishop and 33 additional Bishops in the United States as well as National Bishops overseas. The International Pentecostal Holiness Church believes that biblical marriage is instituted by God, and that the government does not create marriage but is charged to protect it. The IPHC is grateful for the American legal tradition safeguarding biblical marriage, and believes that this legal heritage should be maintained. The IPHC believes and teaches that marriage between a man and a woman is ordained of God, that the

traditional family is the foundation of society, and that marriage and family supply the crucial relationships through which parents and children acquire private and public virtue.

The Missionary Church was founded in 1885 and maintains a deep commitment and obedience to biblical teachings. We currently have 450 churches in 42 states in the United States and are committed to Church Planting and World Missions. The Missionary Church firmly believes in the sanctity of marriage between one man and one woman. Our constitution states: *"Marriage is a sacred institution ordained by God, and is an indissoluble union of one husband (born male) and one wife (born female) until parted by death."*

Open Bible Churches [USA] is an evangelical denomination that represents 1,000 credentialed ministers, 300 churches, and 35,000 constituents. Open Bible is an association of evangelical churches called to be a life-giving force in our society. Marriage and family are foundational to the structure of society. The security of children, the emotional and physical health of adults, and even the condition of the workplace are connected to the presence of healthy marriages and families. Therefore, protecting and nurturing marriages and families is of the highest importance. We believe marriage is God given and sacred – a holy union between one man and one woman in which they covenant with one another and

with God to build a loving, faithful, and lifetime relationship until separated by death.

The United Brethren in Christ Church was founded in 1800 and is committed to obey biblical teachings. We currently have 182 churches in 22 states in the United States and are committed to Global Missions. The United Brethren in Christ Church firmly believes in the sanctity of marriage between one man and one woman. Our discipline states: *"Marriage was instituted by God and regulated by Him. The purpose of marriage is companionship between a man and a woman in a permanent relationship which can end only when one of the partners dies."*

The Wesleyan Church is an evangelical denomination established in 1968 by the union of The Wesleyan Methodist Church and Pilgrim Holiness Church. The Wesleyan Church stands firmly in its conviction that the Bible teaches marriage is the union of one man and one woman. Our constitution states: "We believe that every person is created in the image of God, that human sexuality reflects that image in terms of intimate love, communication, fellowship, subordination of the self to the larger whole, and fulfillment. God's Word makes use of the marriage relationship as the supreme metaphor for His relationship with His covenant people and for revealing the truth that that relationship is of one God with one people. Therefore God's plan for human sexuality is that it is to be

expressed only in a monogamous lifelong relationship between one man and one woman within the framework of marriage. This is the only relationship which is divinely designed for the birth and rearing of children and is a covenant union made in the sight of God, taking priority over every other human relationship."

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Nos. 10-2204, 10-2207, and 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees,
HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

On Appeal from the United States District Court for the
District of Massachusetts, Cause No. 1:09-CV-11156-JLT
The Honorable Joseph L. Tauro

BRIEF OF *AMICI CURIAE* THE STATES OF INDIANA, COLORADO, MICHIGAN, SOUTH CAROLINA, AND UTAH IN SUPPORT OF DEFENDANT-APPELLANTS AND IN SUPPORT OF REVERSAL

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INTEREST OF THE *AMICI* STATES

The *amici*, all of whom are sovereign states of the United States, file this brief pursuant to Federal Rule of Appellate Procedure 29(a), which allows a state to file an *amicus curiae* brief through its attorney general without the consent of the parties or leave of the court. *See* Fed. R. App. P. 29(a).

The *amici* states all have a complex matrix of family law that provides for marriage under the traditional definition of that institution as a legal union between one man and one woman. The *amici* states support and approve of the definition enacted by Congress in Section 3 of the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419, 2420 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). In addition, as sovereigns, the *amici* states have a compelling interest in monitoring the proper bounds of state and federal power and in assisting courts with deciding where those lines should properly be drawn. In that regard, this brief addresses only whether the district court properly applied to DOMA the Tenth Amendment standard of *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997), but does not delve into other possible Tenth Amendment theories.

SUMMARY OF THE ARGUMENT

Unlike States, Congress does not possess general police powers. That is, Congress may enact legislation only as specifically authorized by one of the Constitution's enumerated powers. And because the Constitution does not directly

authorize Congress to define marriage, Massachusetts has challenged Congress's authority to enact Section 3 of the Defense of Marriage Act, which defines marriage for purposes of administering federal programs. In short, Massachusetts contends that Section 3 transgresses the Tenth Amendment's reservation of general police power to the States.

At one level, the *amici* states appreciate Massachusetts's general desire to resist federal encroachment. Particularly in the wake of the Supreme Court's watershed decisions in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), States have been vigilant about tending the constitutional border between state and federal power. *See generally, e.g., Reno v. Condon*, 528 U.S. 141 (2000) (rejecting Tenth Amendment challenge by South Carolina to Driver's Privacy Protection Act); *Connecticut ex rel Blumenthal v. United States*, 369 F.Supp.2d 237 (D. Conn. 2005) (rejecting Tenth Amendment challenge by Connecticut to Magnuson-Stevens Act).

Indeed, Florida and several other states, including Indiana, are currently in the midst of litigating their own Tenth Amendment challenge to Congress's unprecedented expansion of the federal Medicaid program in the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), *as amended by the* Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010). *See Florida et al. v. U.S.*

Dep't of Health and Human Servs., et al., No. 3:10-CV-91-RV/EMT, 2010 WL 2011620 (N.D. Fla. 2010).

Not all Tenth Amendment challenges to congressional enactments are created equal, however. The Tenth Amendment, as an embodiment of the overall constitutional structure, demands sensitivity for the proper delineation of power between what is delegated to the federal government and what is reserved for States. *See* The Federalist No. 28 (Alexander Hamilton) ("It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority"); *Id.* No. 46 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.").

To be sure, the Tenth Amendment is a critical bulwark for States against relentless federal expansion, but acknowledging that some affairs properly belong to Congress does not diminish that protection. Section 3 of DOMA, as a housekeeping tool for federal programs, fits within Congress's affairs.

Different Tenth Amendment tests apply depending on the underlying enumerated power. In analyzing statutes justified by the General Welfare Clause (sometimes referred to as the "Spending Power"), the Supreme Court has applied the test of *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Congress may

provide grants to states to carry out federal programs that (1) pursue the general welfare; (2) impose unambiguous conditions on the states' receipt of federal funds; (3) impose conditions germane to the federal interest purportedly at issue; and (4) are not otherwise barred by the Constitution. *See id.* Congress may not, however, use its spending power to coerce the states into complying with federal decrees. *See id.* at 211 (recognizing the possibility of financial inducements offered by Congress being so coercive as to violate Tenth Amendment limits on the Spending Power).[1]

When analyzing the Tenth Amendment validity of Commerce Clause enactments, the Supreme Court asks (aside from whether the law fits within the parameters of the Commerce Clause) whether an enactment commandeers the apparatus of state government. *See generally, e.g., Printz*, 521 U.S. 898; *New York*, 505 U.S. 144; *Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). Such laws are categorically impermissible because they offend the very principle of state sovereignty. *See, e.g., Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 188.

[1] In their Tenth Amendment challenge to the Affordable Care Act's unprecedented Medicaid expansion, Indiana and the other plaintiff states have invoked each of the *Dole* factors, though their arguments to date have largely focused on the coercion factor. *See generally* Order and Memorandum Opinion, *Florida v. U.S. Dep't of Health and Human Servs.*, 2010 WL 2011620 (N.D. Fla. October 14, 2010) (No. 3:10-CV-91-RV/EMT).

Congress's authority to enact Section 3 of DOMA arises from its Spending Power, not its Commerce Power. That distinction suggests that any Tenth Amendment debates in this case should be about coercion under *Dole* rather than commandeering under *Printz* or *New York*. Massachusetts, however, has eschewed both arguments and has argued instead that this is a case about *germaneness*, *i.e.*, about whether Congress has acted properly within its Spending Power *a priori*. *See Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 252 n.156 (D. Mass. March 25, 2010) ("[T]he Commonwealth acknowledges that 'this is not a commandeering case.'").

According to Massachusetts, refusing to recognize same-sex spouses can cause Medicaid to subsidize higher-income people, an outcome supposedly incompatible with Medicaid as a program for low-income individuals. *See* Pl's. Mem. of Law in Opp'n to Def's. Mot. to Dismiss and Supp. Pl's. Mot. for Summ. J. at 37, *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F.Supp.2d 234 (D. Mass. March 25, 2010), ECF No. 44 (No. 1:09-cv-11156-JLT). Furthermore, says Massachusetts, limiting the federal government's operational definition of marriage to one man and one woman regardless of a given state's definition of marriage is incompatible with the State Cemetery Grants Program, which provides burial sites for veterans and their spouses. *See id.* Thus,

Massachusetts argues, DOMA's definition of marriage is somehow not germane to the purposes of these particular spending programs.[2] *See id.*

The district court ignored Massachusetts's germaneness argument, however, and held that Section 3 of DOMA transgresses the Tenth Amendment because DOMA impinges upon the "core sovereignty" of the states under the test adopted in *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997).[3] Under this test, a federal statute violates the Tenth Amendment when it: (1) "regulate[s] the States as States;" (2) "concern[s] attributes of state sovereignty;" and (3) is "of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional government functions." *Id.*[4]

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[2] Massachusetts's germaneness arguments can be refuted with the elementary observation that Congress can define the purposes and boundaries of its programs however it wants, and once having established such purposes and boundaries, can even create exceptions in light of countervailing policies. There is no rule of constitutional law saying that once Congress decides to pursue a particular objective all succeeding enactments must advance that particular narrow cause. Congress, like the States, is entitled to balance competing policy interests when establishing its objectives and when setting limits to how far it is willing to go to achieve those objectives.

[3] The district court also said that DOMA's definition of marriage violates the Tenth Amendment because it violates the Equal Protection Clause and therefore constitutes an improper use of the Spending Power. *See Massachusetts*, 698 F. Supp. 2d at 247-49. This Tenth Amendment claim, however, is entirely derivative of the Equal Protection claim, *see id.* at 248-49, and while the *amici* states disagree with the district court's Equal Protection analysis and conclusions, they will leave that issue for others to address.

[4] This test is conjunctive in nature; thus, a federal statute must fail all three of these factors in order to violate the Tenth Amendment. *See id.*

The *Bongiorno* test, however, is rooted in the reasoning of the Supreme Court's Commerce Clause decisions, and in particular *Hodel*, 452 U.S. at 287-88, and *National League of Cities v. Usery*, 426 U.S. 833, 852-853 (1976). To be sure, *National League of Cities* was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985), but more recent cases suggest that the analyses in *Hodel* and *National League of Cities* retain some vitality. *Cf. New York*, 505 U.S. at 171-77. Accordingly, the *amici* states do not criticize the *Bongiorno* test as such, but merely question its applicability in this case. The problem is that *Bongiorno*, like all of the cases upon which it relies, examined Tenth Amendment issues in the context of Congress's use of the Commerce Clause, not its use of the Spending Power, which is the basis for Section 3 of DOMA. As a consequence, the *Bongiorno* test is ill-suited for evaluating Section 3 of DOMA.

Even were the *Bongiorno* test applicable, moreover, it is plain that DOMA does not run afoul of each of its components. Section 3 of DOMA merely defines how the federal government defines marriage for its own purposes and does not perforce "regulate the States as States," "concern attributes of state sovereignty," or impair the states' ability to control their own "traditional government functions." *See Bongiorno*, 106 F.3d at 1033. DOMA itself does not require states to adopt a federal standard as the price for participating in dual-sovereign

endeavors.[5] Accordingly, under *Bongiorno*, DOMA presents no discernible Tenth Amendment transgressions.

ARGUMENT

I. *Bongiorno* Does Not Apply to Spending Clause Legislation Such as DOMA

The *Bongiorno* test has no logical application to Congress's spending decisions. In *Bongiorno* this Court upheld the Child Support Recovery Act—Commerce Clause legislation that provides for interstate enforcement of child support obligations—based on the Supreme Court's reasoning in *Hodel* and *National League of Cities*—both of which also examined Commerce Clause legislation. *See id.* at 1032-33; *see also Hodel*, 452 U.S. at 268, 287-88 (upholding Surface Mining Control and Reclamation Act of 1977 against Commerce Clause and Tenth Amendment challenges); *Nat'l League of Cities*, 426 U.S. at 840-41,

[5] To the extent Massachusetts argues that it would be unconstitutional for the federal government to cut off or recapture Medicaid or State Cemetery Grants as a consequence of Massachusetts's provision of benefits to same-sex spouses, it is targeting the wrong law. The statutes responsible for such consequences are the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, and the State Cemetery Grants Program, Pub. L. No. 95-476, Title II, § 202(b)(1), 92 Stat. 1504 (October 18, 1978) (codified at 38 U.S. § 2408), not DOMA. Similarly, to the extent Massachusetts argues that Congress may not force it, as an employer, to collect portions of Medicare or other payroll taxes that result from the federal definition of marriage, those arguments are properly directed at the applicable tax collection directives, not DOMA. The *amici* states take no position in this case as to the viability of any potential broad-based Tenth Amendment challenges to the Medicaid Act, the Medicare Act, the State Cemetery Grants Program, or any other statutes whose consequences for States have been brought into sharp relief for Massachusetts by virtue of Section 3 of DOMA.

852-53 (striking down amendments to the Fair Labor Standards Act attempting to extend federal minimum wage and maximum hour limitations to state government employees).

In each instance, the Court inquired whether the legislation had a compulsive effect upon the states. In *Hodel*, 426 U.S. at 288-89, the Court held that the states' ability to choose not to implement the Surface Mining Act, and to force the federal government to bear the entire regulatory burden, rendered the Act non-coercive. In *National League of Cities*, 426 U.S. at 851-52, the Court invalidated amendments to the Fair Labor Standards Act imposing minimum wage requirements on states as interfering with the states' authority to make "fundamental employment decisions."

More recent cases applying the same reasoning have also examined federal statutes ostensibly grounded in the Commerce Clause. *See generally Printz*, 521 U.S. at 903-04, 935 (holding that the Brady Act, which forced state officials to run background checks as part of federal regulation of firearms sales, violated the Tenth Amendment); *New York*, 505 U.S. at 160 (holding that, though "[r]egulation of the . . . interstate market in [radioactive] waste disposal is . . . well within Congress' authority under the Commerce Clause," Congress may not force states to take title to such waste). *New York* is particularly instructive, as it makes plain

that Dole is the proper test for uses of the Spending Power, whereas *Hodel* is applicable to the Commerce Power. *See New York*, 505 U.S. at 167-68, 171-77.

Bongiorno, as an application of *Hodel's* reasoning, is therefore limited to testing uses of the Commerce Power. It is designed to prevent Congress from directly regulating the states the way it directly regulates employers and other commercial actors.

Section 3 of DOMA represents an exercise of the Spending Power, not the Commerce Power. It defines the terms "marriage" and "spouse," which are used in at least 1,138 federal statutes defining the parameters of federal programs, to advance federal prerogatives, *see Massachusetts*, 698 F. Supp. 2d at 236, but it does not direct the states to do anything. And while Congress may sometimes go too far when using the Spending Power to coerce states indirectly with federal dollars, that is a different inquiry altogether—one that Massachusetts itself has disclaimed. The district court therefore erred in attempting to adapt *Bongiorno* to the Spending Power context.

II. Even if *Bongiorno* Applies, DOMA is Nonetheless an Acceptable Exercise of Federal Power

Even if the *Bongiorno* test could apply to Spending Power legislation, it is plain that DOMA would survive scrutiny. As a limit on federal spending programs created elsewhere, DOMA itself does not "regulate the States as States," "concern attributes of state sovereignty," or impair the states' ability to control their own

traditional government functions. *See Bongiorno*, 106 F.3d at 1033. The Tenth Amendment permits Congress to define the standards by which the federal government will implement its own programs, even if such definitions have some collateral, non-coercive impacts on states. *See New York*, 505 U.S. at 156.

A. DOMA Does Not Regulate the States as States

A federal statute can violate the Tenth Amendment under *Bongiorno* only if it "regulate[s] the States as States." *Bongiorno*, 106 F.3d at 1033. This language, taken from *Hodel*, 452 U.S. at 287, has its origin in the Supreme Court's acknowledgment in *National League of Cities* that "States as States stand on a quite different footing from an individual or corporation" when challenging congressional acts. See *National League of Cities*, 426 U.S. at 854-55. Thus, Congress may not exercise its Commerce Power to "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* No "essential decisions" are being forced on States here.

First, DOMA itself protects the ability of each state to set its own policies on same-sex marriage by easing the force of the Full Faith and Credit Clause as applied to that institution. *See* Defense of Marriage Act § 2, 28 U.S.C. § 1738C ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the

same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship."). This state-law protection arose out of a concern that recognition of same-sex marriages solemnized in one state could be imposed through the Full Faith and Credit Clause on those states that have chosen not to recognize such marriages. See H.R. Rep. 104-664, at 6-10, 16-18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910-14, 2920-22 (1996). Thus, DOMA actually protects the internal policies of each state, rather than allowing one state's policies on a contentious social issue to be imposed on others.

Second, DOMA's marriage definition applies when "determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." Defense of Marriage Act § 3, 1 U.S.C. § 7. Accordingly, DOMA's definition of marriage for federal purposes has many applications that have *nothing to do* with States. At least 1,138 statutes, covering topics ranging from the availability of retirement benefits for federal employees, *see, e.g.*, 5 U.S.C. § 8341 (retirement annuities, including joint and survivor annuities), to personal leave, 5 U.S.C. §§ 6382-83 (federal employees may use up to a total of twelve administrative work weeks of sick leave each year to care for a spouse with a serious health condition), to Social Security benefits, 42 U.S.C. § 402, and more, differentiate on the basis of marital

status. DOMA targets management of the *federal* government, not States, regardless of any incidental non-coercive impact on state affairs.

Third, as part of its analysis on this point the district court focused on "the impact of DOMA on the state's bottom line," which has nothing to do with whether DOMA targets States as such. *Massachusetts*, 698 F. Supp. 2d at 249. Many unquestionably valid federal laws may have an incidental impact on State revenues—even patent laws may curb corporate profits and therefore constrict state tax revenues. Furthermore, any impact on Massachusetts' "bottom line" is not a result of direct regulation by DOMA so much as other federal programs and Massachusetts' own decisions to spend money in circumstances where the federal government will not reimburse it. It is not as if (for example) DOMA requires Massachusetts to spend money on the burial of veterans' same-sex spouses, but then withholds reimbursement for such burials. DOMA merely uses a traditional definition of marriage to limit the claims the federal government is willing to pay—to states or anyone else.

DOMA is not, therefore, a regulation of states as states, and thus survives the first *Bongiorno* test.

B. Defining Marriage for the Purposes of Federal Law Does Not Implicate Attributes of State Sovereignty

To violate the Tenth Amendment under *Bongiorno*, a statute must also "concern attributes of state sovereignty." *Bongiorno*, 106 F.3d at 1033. The amici

states wholeheartedly embrace the notion that the ability to define marriage for the purposes of state law is a long-standing attribute of state sovereignty. *See Massachusetts*, 698 F. Supp. 2d at 236-39. Indeed, the Supreme Court has repeatedly (and correctly) identified family law as an example of a quintessentially local area of law. *See, e.g., United States v. Lopez*, 514 U.S. 549, 564 (1995) (expressing concern that an overly broad reading of the Commerce Clause could lead to federal regulation of "family law (including marriage, divorce, and child custody)"); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . . Besides, it must be conceded that the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce.").

But Section 3 of DOMA does not attempt to regulate domestic relationships recognized by State law—again, Section 2 of DOMA reinforces State sovereignty in that regard. Section 3 merely defines what relationships the federal government itself recognizes and, in effect, is willing to subsidize. Section 3 of DOMA is explicitly restricted to federal law, and does not purport to modify or interfere with state law in any way, so it implicates no attributes of state sovereignty. Defense of Marriage Act §3, 1 U.S.C. § 7.

Put another way, the federal government's refusal to recognize same-sex marriages no more invalidates Massachusetts's same-sex marriages than does Indiana's refusal to recognize them, as DOMA authorizes Indiana to do. Defense of Marriage Act § 2, 28 U.S.C. § 1738C. When Indiana refuses to recognize same-sex marriages, it is exercising its own sovereignty, not trenching on that of Massachusetts. The same goes for the federal government. When Congress chose not to provide same-sex couples with the benefits it provides married couples, it exercised its own sovereignty, not Massachusetts'.

C. DOMA Does Not Impair Massachusetts' Ability to Structure Integral Operations in Areas of Traditional Government Functions

The third *Bongiorno* test asks if the federal statute is "of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional government functions." *Bongiorno*, 106 F.3d at 1033.[6] This test inquires whether the statute "infring[es] on the core of state sovereignty" by usurping a power unique to the states. *Id.*

The core of state sovereignty is most clearly infringed when a federal statute commandeers or otherwise directly coerces state behavior. *See, e.g., New York*, 505 U.S. 144. As Massachusetts admits and the District Court recognized,

[6] Though the Supreme Court once explicitly disavowed this "traditional government functions" analysis, *see Garcia*, 469 U.S. at 531, more recent authority suggests that it is nonetheless appropriate (at least with regard to Commerce Clause legislation). *Cf., e.g., New York*, 505 U.S. at 177

however, DOMA does not commandeer or coerce states. *See Massachusetts*, 698 F. Supp. 2d at 252 n.156.

Beyond commandeering or coercion, the Supreme Court has made plain that the core of state sovereignty includes the power of the state to locate its seat of government, to appropriate its own public funds, and to determine wages, hours, and other compensation for state employees. *See Nat'l League of Cities*, 426 U.S. at 845. Core state sovereignty also includes the ability to educate children and to enact and administer criminal laws. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) (listing criminal law enforcement and education as areas in which states have historically been sovereign). And, the *amici* states agree, core state sovereignty includes regulation of marriage and family. But again, DOMA does not by its terms alter state laws and policies bearing on marriage and family. *See supra* Part II.B. If Section 3 of DOMA, as one among many limits on federal programs, indirectly influences how states govern themselves, such influence is subject to the *Dole* coercion test, which Massachusetts has disclaimed.

The District Court said that Massachusetts's potential loss of federal grants to construct and maintain cemeteries for state military veterans, and the state's incursion of additional costs relating to other federal grant programs, evidence DOMA's "impediments . . . on [Massachusetts'] basic ability to govern itself." *See Massachusetts*, 698 F. Supp. 2d at 252. Under that reasoning, however, the Tenth

Amendment question has become not whether regulation of marriage and family is a matter of "core state sovereignty," but whether a state's ability to define the terms of federal grants qualifies as such. Without a theory that the terms of federal grants are coercive, however, the District Court's essential holding in that regard has no doctrinal support.

Indeed, Congress frequently conditions federal grants on a States' willingness to adhere to *federal* policy, even in areas touching on core state sovereign powers such as appropriations and education. *See, e.g.*, Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6987) (requiring states to appropriate enough money to match federal grants if states are to participate); No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2001) (codified in scattered sections of 20 U.S.C.) (offering federal funds to states that adopt federal education standards). If DOMA is invalid simply because it somehow ties federal grants to state policies in regard to a core sovereign interest, then so are these (and possibly many other) programs.

While Tenth Amendment respect for state sovereignty precludes Congress from using its Spending Power coercively (or in violation of the other *Dole* factors), such respect does not yield a right to federal subsidy of state policies, even where core state sovereign powers are at issue. Federal grants have become a

routine component of the modern administrative and welfare states, but that does not mean States are nothing more than federal dependants constitutionally entitled to minimum annual disbursements regardless of their policies.

Massachusetts disclaims the notion that DOMA, alone or in combination with other statues, unlawfully coerces it into adopting state marriage policies it otherwise would not. DOMA therefore does not impermissibly interfere with Massachusetts' definition of marriage.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted,

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Counsel for Amici *States*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because according to the word-count function of the word-processing program in which it was prepared (Microsoft Word), this brief contains 4,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word word processing software in 14-point Time New Roman font..

/s/ Thomas M. Fisher
Thomas M. Fisher

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Appellate CM/ECF system on January 25, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System.

/s/ Thomas M. Fisher
Thomas M. Fisher

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THE HIGH COURT
DUBLIN

No. 934/04 JR

BETWEEN/

KATHERINE ZAPPONE AND ANN LOUISE GILLIGAN

Plaintiffs

-and-

REVENUE COMMISSIONERS, IRELAND
AND THE ATTORNEY GENERAL

Defendants

-and-

THE HUMAN RIGHTS COMMISSION

Notice Party

HEARING HELD BEFORE MS. JUSTICE DUNNE
ON TUESDAY, 10TH OCTOBER 2006 - DAY 5

I hereby certify the following to be a true and accurate transcript of my shorthand notes in the above named matter.

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_____

Stenographers

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THE HEARING RESUMED, AS FOLLOWS, AFTER THE SHORT ADJOURNMENT

MR. GALLAGHER: Professor Waite, we are going to ask you to give evidence now and before doing so the Registrar will swear you in.

PROFESSOR LINDA WAITE HAVING BEEN SWORN WAS EXAMINED VIA VIDEOLINK, AS FOLLOWS, BY MR. GALLAGHER

Q. MR. GALLAGHER: Professor Waite, before asking you to deal with certain aspects of the evidence, I am going to hand in to the Judge a copy of your curriculum vitae and ask you to briefly describe some of the relevant aspects of that in connection with the evidence that you are going to give to the Court. At present, Prof. Waite, you are the Lucy Flower Professor in Urban Sociology in the University of Chicago, is that correct?
A. Yes, it is.
Q. You are also the Co-Director of the MD/PhD Programme in Medicine, the Social Sciences, and Aging?
A. Yes.
Q. You are also Co-Director of the Center on Aging in the University of Chicago, is that correct?
A. It is.
MS. JUSTICE DUNNE: Can I check that everybody

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can hear?
MR. COLLINS: Yes, I can.
Q. MR. GALLAGHER: I hope you can hear me, Professor?
A. I can.
Q. Thank you. You are also Co-Director on the Center on Parents, Children and Work at the Alfred P. Sloan Working Family Center?
A. Yes, it is funded by the Alfred P. Sloan Center but it is located at the University of Chicago.
Q. You are a member of the Institute for Mind and Biology in the University of Chicago?
A. Yes.
Q. You are also a Research Associate at the Population Research Center, North University of Chicago?
A. Yes.
Q. You are also Chair on the Committee on Demographic Training at the University of Chicago?
A. Yes.
Q. By training and background, you did your BA in the Michigan State University and an MA in sociology in the University of Michigan and your Ph.D. is in the University of Michigan, is that correct, both of those in sociology?
A. Yes.
Q. On the second page of your CV you identify professional organisations and honours and, in particular, you were the recipient of the 2000 Outstanding Book Award from the Coalition for Marriage, Family and Couples

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Education, for the Case of Marriage: While Married People are Healthier, Happier and Better Off Financially. You were a member of the Council of the American Sociological Association between 1996 and 1999. You were President of the Population Association of America in 1995 and you were the recipient of the 1993 Duncan award from the American Sociological Association for New Families, No Families, the Transformation of the American Home, and you were a sociological research association by election?
A. Yes.
Q. You also set out your various professional activities from 1990 to 2005. Then on the fourth page of your CV, you set out publications, books and articles which you have authored or co-authored with other authors, is that correct?
A. It is.
Q. What is the main area of your research and study, Professor?
A. I would say it is the family.
Q. Any particular aspect of the family structure or any particular type of family structure?
A. I studied marriage as a social institution; cohabitation, divorce, working families and aging families. The family.
Q. As a result of that research and study, did you form conclusions on the basis of what you have read, what you have studied and some original research which you have carried out yourself on those matters and, in

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particular, the family structure?
A. Yes, I have.
Q. You have made a study, I think, as part of that as you have described of the institution of marriage, is that correct?
A. It is.
Q. That is heterosexual marriage as we would describe it?
A. Yes.
Q. In the course of that study and the conclusions which you have drawn from it, did you arrive at any opinion with regard to whether benefits accrue to the individuals involved in a heterosexual marriage, the partners and the children, and whether any benefits accrue to society at large?
A. Yes, I have.
Q. Would you summarise for the Court, Prof. Waite, what your conclusions are in that regard?
A. I conclude and feel strongly that the evidence overwhelmingly supports the conclusion that the social institution of marriage changes the choices and the behaviour of individuals, the individuals involved and those around them in ways that make them better off, that improves their physical health, that improves their emotional health and improves outcomes for children, that improve their sexual relationship, that improve their wealth and assets and career outcomes, and decrease domestic violence.
Q. With particular regard with the benefits that accrue to children, could you identify what those are?

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A. I think they are quite extensive and they involve emotional well-being, and that has been quite extensively studied. They involve physical health; children who were raised in a two parent family are less likely to become ill when they are aged and less likely to die when they are post-retirement age. Children on average do better in school; they have fewer behaviour problems, they have higher academic achievement, they are more likely to graduate from college, they are more likely to have good occupations, they are more likely to form married families themselves and stable families, and they are less likely to have children while unmarried.

Q. In general terms, Professor, could you tell the Court is there a consensus among scholars who have studied the heterosexual marriage as to the benefits that you have described for the individuals involved and society, is there a general consensus in that regard?

A. I think there has been a lot of debate. There has certainly been a lot of debate in scholarly and policy based communities in the United States and I think over the last 10 or 15 years such a consensus has emerged. It is still actively debated.

Q. I take it that the evolution of this certain consensus that has emerged, that has emerged following a detailed study and following considerable debate between people who have an interest in this interest and who have studied it, is that correct?

A. Very much so.

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Q. Over what period of time have these studies in relation to the benefits of heterosexual marriage been carried out?
A. More than a century.
Q. Are those studies in large part carried out by sociologists or also people of other disciplines?
A. No, many academics. They would be carried out by people in children development, psychologists, economists, sociologists, anthropologists, people across the range of social sciences and medicine.
Q. With respect to the benefits that you have identified that accrue to children of a heterosexual marriage, have you any views as to the relevance of the complementarity of the sexes to the derivation of those benefits or the accrual of those benefits?
A. Yes, I do. I certainly have seen literature that suggests that in child rearing, the father and the mother help children develop different sets of skills, that they tend to interact differently with children and that the different kinds of interactions benefit children in different ways.
Q. Have you drawn any conclusions or seen any evidence in relation to the relevance of the presence of the biological father in those families?
A. Yes, there is research literature on that. It is in development, and there are papers and publications coming out all the time. There are some very nice recent work that compares step-parents and biological parents, parents in different kinds of social

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institutions, and it suggests that two biological parents in a married low conflict relationship are the best environment for child development.
Q. In terms of non-heterosexual marriages, has any equivalent type of study been carried out that enables us to draw any scientific conclusions with regard to the benefits or disadvantages of those marriages?
A. I think it is a very different kind of research. The kind of research to which I referred earlier about the benefits of particular family structures is based on large scale survey research of many families, so I think is more persuasive and has stronger scientific evidence than the research that has been done on gay and lesbian parents, none of which to the best of my knowledge is based on survey research, it is all based on interviews or very much smaller scale non-random samples, so it is a much weaker basis for drawing scientific conclusions.
Q. Am I correct from what you have said that the period of time over which the research has been done on heterosexual marriage, I think you said 100 years, is considerably greater than the period of time over which research has been done on non-heterosexual marriages or relationships?
A. Yes.
Q. Is that significant or relevant to the conclusions which we can draw from the work or research that has been done?
A. Yes, I think it is. It is also the case that if there

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is large scale social change underway, that research evidence, even very high quality research evidence from 15 years ago, could have little bearing on the current situation.

Q. Why do you say that, Professor?

A. Well, if the situation in which families are operating has changed very fundamentally, if attitudes have changed, if the economy has changed, if the legal structure has changed, then something that mattered in the past may not matter now, may matter differently, and all of those things need to be taken into consideration if you are trying to say something about what is going on now or what may go on in the future.

Q. If you have carried out research over a long period of time in different social conditions or different economic conditions, are you better enabled to draw conclusions with regard to what are the factors that might affect the outcomes of those studies?

A. Very much so.

Q. I think you are familiar with a review which has been done by Prof. Steven Nock into the research that has been conducted in relation to children brought up by same-sex couples, is that correct?

A. I have it in front of me.

Q. Firstly, could I ask you, Prof. Waite, to tell the Court who Prof. Nock is and what is his status in the scientific community?

A. He is a chaired Professor of Sociology at the University of Virginia and has won a number of awards

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from various professional associations for his work, including a book that won an award from the Family Section of the American Sociological Association called "Marriage in Mens' Lives". He has also written extensively on research methodology and teaches research methodology.
Q. How is he regarded amongst fellow scientists in this area?
A. Very highly.
Q. In terms of the affidavit, the structure, firstly he explains a very important issue in relation to the conclusions that you might draw from the study and identifies the distinction between a correlation and a causal connection, isn't that correct?
A. Yes.
Q. Do you agree with the views he has expressed on that issue?
A. I think they are uniformly accepted within the social sciences, not just in sociology, but in all the social sciences.
Q. In terms of the design of the study and the precautions that you have to take to carry out a scientifically rigorous and sound study, do you agree with the views he has expressed in the affidavit in that regard?
A. Yes, very much.
Q. I think one of the matters that he identifies as being very important and relevant to conclusions or the reliability of conclusions that you can draw from studies in this area is the presence or absence of

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random sampling of the subject of the study, isn't that correct?
A. Yes.
Q. Could you perhaps explain briefly to the Court the importance of that or the disadvantages where the sampling is not done on a random basis but, for example, is done on a snowball basis?
A. Certainly, and it is very easy. If I wanted to ask people, say, political opinions, if I wanted to look at peoples' political opinions and I asked my friends and they ask their friends, then they would be part of a small and unusual group of people. To say anything about how the country would vote, the basis of what my friends and I think is laughable, it tells you nothing except that this group of people felt this way or did these things, but you can't say anything about the phenomenon in the population at large.
Q. How important is the use of random sampling if you want to derive conclusions relevant to the population at large or applicable to the population at large?
A. It is absolutely essential. What you need to do is to collect information, people who represent the population as a whole, and there is a highly developed set of techniques, in fact there are professions called 'survey samplers' who are sampling statisticians who decide exactly the characteristics of the sort of sample you need where you need to look and how you need to approach people, so that everyone in the population you are studying has an opportunity for their views,

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their attitudes and their behaviours to be represented in your data.
Q. Is there any controversy, Professor, with regard to the importance of the methodology designs or the methodological procedures identified by Prof. Nock in his affidavit if one is to be able to draw any meaningful conclusion from a study?
A. No, no, I think not. I think that there are other ways of gathering information that might tell you what people are thinking or some people are thinking. There are ways to enrich survey sampling, but random sampling is the goal standard.
Q. In terms of the size of the sample, is that important?
A. It is very important. Even if you randomly selected two people, they will by definition not be typical of the whole country.
Q. Professor, I think you had an opportunity of reading Prof. Green's testimony and his report, is that correct?
A. I did.
Q. Prof. Green expressed the view that you could draw meaningful conclusions from small samples of people of limited numbers that were not drawn on a random basis, what is your view in relation to that?
A. I think that these could only be suggestive, that there are no conditions under which those could be affirmed to represent those processes or those attitudes in the population as a whole. They may, but they may not, and the fact that these associations were found does not

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tell you anything about the population as a whole.
Q. In terms of the importance in sociology of longitudinal studies as opposed to cross-sectional studies, could you explain to the Court the importance of that and the limitations of cross-sectional studies?
A. Yes. If you talk to people now about their attitudes and their behaviour, about their lives and their families, then you look at characteristics of people and families and try to say something about differences across racial groups or other population groups, all you can really say is that they are associated, and you can't say and you can't make any claims about whether these are causal, whether one causes the other. The social sciences now take this extremely seriously, that if you have a cross-sectional relationship, you can't even use the word 'cause', you can't even use the word 'effect', you can say they are 'associated', but it implies nothing about whether one causes the other.
Q. In terms of looking at effects on members of the population of a particular, for example, family structure, in your view is it possible to glean much information from looking at the subjects of investigation at a very tender age as opposed to a more advanced age where they have been exposed to that structure for a considerable number of years?
A. It could tell you about the well-being of children of that age, but it couldn't tell you anything about the long run.
Q. Has there been some general acceptance or some examples

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of the difficulty, some examples in recent times or over the last decade or so of the difficulty in predicting social outcomes, social impacts of changing structures, by reference only to particular cross-sectional studies or studies at a particular point in time or a limited point in time?
A. I think very much so. I think when the United States was debating changes in divorce laws, it was firmly believed by child development specialists at the time that as long as children had a loving parent, at least one, that they would be fine if their parents divorced, they would get over it quickly and move on with their lives. Over the last 30 or 40 years, I think evidence has slowly but very steadily accumulated that this is not at all the case, that divorce plays a much larger roles in childrens' lives, in their emotional well-being, in their career and personal accomplishments as adults even through their 30's, and none of that was known or expected at the time.
Q. Those conclusions that have now been drawn or those lessons that have been learned, have they been learned because of the passage of time and the number of studies that have been carried out over that period of time providing additional and more rigorous information to people who are studying these issues?
A. Yes, and I think especially by the availability of longitudinal data, that children were followed over long periods, decades, and very large numbers were studied under various circumstances over long periods.

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Q. Professor, when you are studying family structures and impact on children, are there a wide range of possible indicators of well-being or welfare that you could study?
A. Absolutely.
Q. Do I take it that some of the studies concentrate on particular indicators and study those?
A. Yes.
Q. In order to gain an overall picture in terms of the overall using it in very broad terms physical and emotional well-being of children, I take it it is appropriate or ideal that you would study this over a wide range of indicators?
A. It is. Would you like an example?
Q. Yes, if you would be good enough.
A. There is a very nice book written by Paul Amato and Alan Booth called "A Generation At Risk". They followed about 3,000 families over about 30 years during which time some families divorced, so they could compare the outcomes of the children whose families divorced holding constant many of the statistically controlling or taking into account many of the characteristics of the families before the divorce. They used as outcome measures a series of indicators of emotional well-being, but they used, in addition, indicators of accomplishment or achievement; number of years of education completed, the status of the occupation people achieved, the age at marriage, out of wedlock child bearing, wages earned in adulthood. All

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of these present a more balanced picture than any one of them could possibly.
Q. If I can revert to just some specific aspects, Professor, of the methodology of studying these social phenomenon and the impact on people and family structures. Am I correct in saying that when you design your study, you must take account of and attempt to exclude factors that may confound or bias the results in some way?
A. Absolutely, it is extremely important.
Q. I think you are aware from Prof. Green's evidence that in his 1986 study between outcome for children in terms of sexual identity and relationship to their peers involved a comparison, on the one hand, between children brought up by gay parents, 78% of whom had a partner and, on the other hand, children brought up by a heterosexual parent of whom only 10% had a partner. How relevant is that sort of factor in determining the conclusions or the validity of the conclusions which can be drawn from the study?
A. I think that one could argue that you could not do a comparison, that the information on single heterosexual mothers would tell you nothing about children raised in heterosexual families compared to children raised in two parent lesbian families. It is an inappropriate comparison.
Q. In terms of the Court assessing the outcome of various studies, how important is it to have a full picture of the methodology and the controls that are used to

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exclude these confounding or biased factors?
A. It is extremely important. No one should pay any attention to studies that are poorly done. They are just some stories, they really are not science.
Q. I think you have seen the criticisms in the Nock affidavit of various studies?
A. I have, yes.
Q. If those criticisms are valid, if his statements as to the limitations of those particular studies are valid, what impact does that have for the conclusions or reliability of the conclusions we can draw from those studies?
A. It very much undermines that. If the studies are not well done, then one shouldn't take them seriously in developing any sort of scientific consensus.
Q. One final factor I think in terms of the methodology, how important is it to assemble the appropriate comparison group, Professor?
A. It is absolutely essential.
Q. Can I ask you whether on the scientific evidence as it now stands can your conclusions as to the benefits of heterosexual marriage for those involved, and particularly children, be extrapolated to same-sex couples or same-sex marriage?
A. No, I think they can't.
Q. Professor, lest, because there has been some suggestion in some of the studies that have been done and some of the advocacy in the studies that people in this area sometimes come to the issues or the studies with some

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antagonistic ideological viewpoint, could you tell the Court what your general ideological viewpoint is in relation to these matters?
A. I don't have an ideological position. I would like things to be good for children under any circumstances. I would like it if we didn't have to worry about any of this.
MR. GALLAGHER: Thank you, Professor.

END OF DIRECT EXAMINATION OF PROFESSOR WAITE BY MR. GALLAGHER

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PROFESSOR WAITE WAS THEN CROSS-EXAMINED VIA VIDEOLINK, AS FOLLOWS, BY MR. COLLINS

Q. MR. COLLINS: Professor Waite, my name is Michael Collins and I am Counsel for the Plaintiffs in this case and I just want to ask you a few short questions. I think your primary research interest has been in the interest of age and demographics and how that affects the family unit?
A. No, I would say that is not the case, I would say it is the family more generally. Over the last ten years I have been doing more work on aging, but in my early career I really worked only on young families.
Q. Your current research interests include social demography, aging, the family, health, working families, the link between biology, psychology and the social world; is that right?
A. Yes, it is.
Q. Sociology as a discipline, I think, is primarily concerned about group interactions, how individual groups react within themselves and groups reacting with other groups in society?
A. I think that is too narrow a definition. I think sociologists are also interested in social institutions, in social structures and in individual choices about family, individual attitudes and social networks. Expand on the boundaries a little bit.
Q. You are not a psychiatrist or a psychologist, are you?
A. I am not.

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Q. You don't profess any expertise in the mental health of individuals?
A. I have done some work in sociology on the mental health of individuals.
Q. Yes, but as a sociologist?
A. As a sociologist.
Q. I think in 1995 you were President of the Population Association of America?
A. Yes.
Q. That was looking really at the big picture of demographics and population?
A. Yes.
Q. That in turn led you to write an article in demography?
A. Demography.
Q. Which you later expanded into a book called "The Case For Marriage"?
A. Yes, that was the presidential address to the Population Association.
Q. The book "The Case For Marriage" was written, I think, with a co-author whose name escapes me. Sorry, a Ms. Gallagher?
A. Yes.
Q. Margaret Gallagher or a Maggie Gallagher, is that right?
A. Yes, Gallagher.
Q. Ms. Gallagher is a popular syndicated columnist in newspapers in the United States?
A. Yes.
Q. She and you would have differences on views on a number

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of political matters?
A. Yes.
Q. To put it in what I am sure is much too crude and simplistic terms, you would come from the Liberal Democratic side of the spectrum and she would come from the Conservative Republican side of the spectrum?
A. Yes.
Q. You have a common view, however, that you express in your book as to the value that marriage represents along the lines that you have just told Mr. Gallagher?
A. Yes.
Q. One point of difference that you note in the book between yourself and Ms. Gallagher is that she is opposed to same-sex marriages, whereas you are either neutral or in favour of same-sex marriage, as expressed in the book?
A. Yes.
Q. Is that fair?
A. Yes.
Q. Why have you taken that view of being in favour of same-sex marriage?
A. You just changed your statement, I would say I am neutral.
Q. My question was neutral or in favour.
A. Yes, I agreed neutral or in favour and I would say I am neutral. I feel that way because, first of all, I am not a terribly political person and this is a very political area, and because I think we can't know about large scale social change and its consequences, whether

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they will be good for society, good for individuals, good for some people and bad for other people, good for some communities and bad for other communities. I think we just don't have the evidence to know. More than that, I see my role as a scientist as evaluating the evidence, not telling people what to do.

Q. Do you consider there is any reliable scientific evidence to support the proposition that children are worse off if their same-sex parents are married as opposed to unmarried?

A. There is no evidence on that point that I know of.

Q. Right. Are some of the virtues of marriage that you have outlined to us in terms of the beneficial effects on stability, commitment, fidelity and so forth, are they benefits that can be enhanced for a same-sex couple if they are recognised by the State as entitled to marry?

A. It is possible, it may be the case, it may not be the case. I think we don't have any evidence. In theory, maybe yes, maybe no.

Q. When Mr. Gallagher here in this court was cross-examining Prof. Green, he put to Prof. Green an academic article or a study by Judith Stacey and Timothy Biblarz called "How Does the Sexual Orientation of Parents Matter" from the American Sociological Review, you are probably familiar with that?

A. Yes.

Q. I can just draw attention to two points that they make in that study. When dealing with the question of

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childrens' mental health, and I am just going to read out a short passage from it and ask you to comment on it. This is at page 171. You probably don't have it there, do you Prof. Waite?
A. No, but I have read it a number of times.
Q. All right. They say:

"Given historical social prejudices against homosexuality, the major issue deliberated by judges and policy makers has been whether children of lesbian and gay parents suffer higher levels of emotional and psychological harm. Unsurprisingly therefore, childrens' self-esteem and psychological well-being is a heavily researched domain."

They then refer to Table 1 which sets out the findings of about 13 or 14 studies to which they refer and summarises what the key findings are. They say:

"These studies find no significant differences between children of lesbian mothers and children of heterosexual mothers in anxiety, depression, self esteem and numerous other measures of social and psychological adjustment. The roughly equivalent level of psychological well-being between the two groups holds true in studies that test children directly, rely on parents' reports and solicit evaluations from teachers."

First, is that a fair summary of the studies to which they are referring?

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directly.
Q. All right. In terms of that particular conclusion, would you agree or disagree with that conclusion, that the studies don't show any difference between the children of heterosexual parents and the children of same-sex parents?
A. I haven't read the studies, so I couldn't say.
Q. All right. A different point, Prof. Waite, which the authors refer to, and this is at pages 174 and 175, and I won't read it all out, it is a little bit long, but the essence of what they are saying is that the two parents in the same-sex marriage, if they are women in the case of lesbian relationship, seem to have particularly good relationships with their children and they say that it may be the case that gender studies show that women have, for whatever reason, be it innate or be it society driven or whatever, they have better abilities and better parenting skills than fathers do. Just to summarise the short part of what they say at page 175:

"We believe, as do Brewaeys et al, 1997, Chan et al, Flax et al that the comparative strengths these lesbian co-parents seem to exhibit have more to do with gender than with sexual orientation. Female gender is probably the source of the positive signs for parenting skill, participation in child rearing and synchronicity in child evaluations shown in the comparisons in Table 2. Research suggests that on average mothers tend to be more invested in and skilled at childcare than fathers and that mothers are more apt than fathers to engage in the kinds of childcare activities that appear to

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be particularly crucial to childrens' cognitive, emotional and social development, citing Furstenberg & Cherlyn, Simons & Associates. Analogously these studies have matched lesbian and heterosexual couples women in every category, heterosexual birth mother, lesbian birth mother, non-biological, lesbian and social mother, and all score about the same as one another, but score significantly higher than the men on measures having to do with the care of children."

Is that a fair comment based on your experience, that women, whatever their sexual orientation, tend to be better at this job than we men are?

A. Better mothers!

Q. Better on the category of childcare, unquestionably better mothers?

A. I haven't compared the parenting on those dimensions for women and men, but the argument is very convincing to me. Certainly women parent differently than men do.

Q. My wife certainly agrees with the conclusion in any event. You made a reference in your evidence to Mr. Gallagher about a comparison between biological parents and other parents or parents who are not biological parents. I just missed what you were saying in that respect, Prof. Waite, and perhaps you could go over that again for me?

A. Yes, there have been some recent studies, there is one report that is a summary much like the Stacey and Biblarz article from child trends. There have been a number of other recent studies on differences between stepfathers and biological fathers, between

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co-habitating biological fathers and married biological fathers that find significant differences in investments in children, in parenting and in childrens' outcomes for these different categories. So it seems to be the case and these are only a couple of studies, but they are very well done based on large samples. You need to take them seriously but they are not definitive in that no single study can be really. They suggest that it is not just having your biological father present, but the nature of his ties to your mother. So there is a difference between two married biological parents, two unmarried biological parents and between married parents where one is not biologically connected and married parents where one is.

Q. Do I understand that those studies are concerned with comparing heterosexual married parents on the one hand, and on the other hand, either single lesbian parents or a married couple but where one of the couple is a step-parent and is not the biological parent?

A. None of these look at same-sex parents at all.

Q. That is what I am getting at.

A. They are all heterosexual prefaced.

Q. There is no comparison between comparing heterosexual parents and same-sex parents?

A. That's right.

Q. I am sure you are familiar, Prof. Waite, with the Avon study that is reported on by Golombok & Others in the article "Children With Lesbian Parents: A Community

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Study" in the Developmental Psychology Journal?
A. No, I am not, I am not familiar with that.
Q. All right, I won't dwell on it then, Prof. Waite, but this was a longitudinal study of 14,000 mothers in England in Bristol which, the authors say, has provided "a unique opportunity to study a representative sample of lesbian mother families and thus determine whether the findings of existing investigations will be replicated in a general population sample." Again at the risk of over-simplifying, they draw the conclusion that the results are the same as the other studies, there is no evidence of any significant difference between the same-sex couples.
A. How many lesbian families were in that 1,400 person sample?
Q. Mr. Gallagher tells me 39, and I am sure he is right in that. There were 39 lesbian mother families, 20 headed by a single mother and 19 headed by a lesbian couple.
A. I would say it is wonderful to have 39 randomly selected lesbian families, but it is too few to say anything about. To give you an example of a recent study done by a colleague of sexuality, the National Social Life Study, any group that had less than 50 representatives was never mentioned. So 39 is a very very small number of lesbian families.
Q. That study certainly wouldn't change the neutral view that you have expressed earlier?
A. No, it would not.
MR. COLLINS: Thank you very much,

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Prof. Waite.

END OF CROSS-EXAMINATION OF PROF. WAITE BY MR. COLLINS

PROFESSOR WAITE WAS THEN RE-EXAMINED VIA VIDEOLINK, AS FOLLOWS, BY MR. GALLAGHER

Q. MR. GALLAGHER: Professor Waite, just one question. In terms of the available scientific evidence that exists at present, does that demonstrate for us or tell us what parent combination provides the best outcome for children?
A. Yes, I think it does.
Q. What does it tell us?
A. It would be married biological parents and if all of this research is on heterosexual parents in a low conflict marriage.
MR. GALLAGHER: Thank you very much, Professor.

END OF RE-EXAMINATION OF PROFESSOR WAITE BY MR. GALLAGHER

MS. JUSTICE DUNNE: Thank you very much, Prof. Waite, for being in attendance today, thank you.
A. My pleasure.

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MS. JUSTICE DUNNE: Very good. Where do we stand?

MR. GALLAGHER: That is our evidence, Judge, subject to two matters. I reserved the right to make some slight technical qualification to the evidence of Dr. McMahon that was handed in and I have one slight qualification to make to that. I mentioned that to Mr. Collins overnight and that should not take any time. Mr. Collins, I think, wants to respond in relation to the qualification we had on Mr. Cremins' evidence of PricewaterHouse and we are awaiting a response to that, but I am sure that can be finalised overnight as well.

MR. COLLINS: I have that and I will give it to Mr. Gallagher, I meant to give it to him earlier today. I don't anticipate there will be any controversy.

MR. GALLAGHER: Effectively I think the oral evidence is over, Judge, and we would propose beginning our submissions tomorrow if that suited the Court.

MS. JUSTICE DUNNE: No particular problem with that. I just want to make sure I have all of the documents that you have been referring to at length, because I am not 100 per cent sure that I do, so would you just bear with me for one second.

MR. GALLAGHER: Certainly.

MS. JUSTICE DUNNE: The one statement I am not

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sure I have or the one study that was referred to over and over again was the Stacey and Biblarz study, and I don't appear to have a copy of that.

MR. GALLAGHER: I am sorry about that and I can remedy it immediately.

(SAME HANDED TO THE COURT).

MS. JUSTICE DUNNE: I want to go over everything else. I have both sides' legal submissions. I have the various authorities, so I don't need to worry about those that have been handed in. I have the affidavit of Prof. Nock. I have the draft witness statement of Joost Blom and the various other documents and witness statements that have been agreed. Just in regard to that, I think there is Dr. Evelyn Mahon, Mr. Cremins that we were just mentioning a moment ago, Prof. Green's report and Prof. Waite's CV. Is there anything else?

MR. COLLINS: There is Prof. Kennedy's report. There will be, I think, the short report from my Canadian lawyer, but I will discuss it also with Mr. Gallagher before I hand it in, as we discussed with Mr. O'Donnell earlier today. Then there are the academic articles and Prof. Maguire's report that you have. Then the academic articles we have been discussing, the Stacey & Biblarz which has just been handed in, the Herek article and the Golombok Avon study,

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MS. JUSTICE DUNNE: All right.
MR. GALLAGHER: I am just slightly alarmed by Mr. Collins saying he may have some report from a Canadian lawyer. We were going to call Prof. Blom but didn't do so on the basis that there wasn't a dispute with regard to his evidence. If there is a material dispute, I would just reserve the right to re-visit that tomorrow morning.
MR. COLLINS: We covered this earlier today.
MR. GALLAGHER: I am sorry. Judge, may I convey the thanks of the parties to you, to the registrar, the stenographer and to your crier for sitting late today to facilitate the evidence, thank you very much.
MS. JUSTICE DUNNE: No problem at all, we are still ahead. Could I ask you both to consider one other matter and at the risk of being difficult in relation to the matter, has anyone looked at the most recent decision of the Court of Appeal in California?
MR. GALLAGHER: Yes, yes.
MS. JUSTICE DUNNE: Are you dealing with that in your submissions?
MR. GALLAGHER: Yes.
MS. JUSTICE DUNNE: That is fine. All right, tomorrow morning at 11 o'clock and we will be here.

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THE HEARING WAS THEN ADJOURNED UNTIL WEDNESDAY, 11TH OCTOBER 2006 AT 11:00 A.M.

The Heritage Foundation
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CONGRESSIONAL TESTIMONY

The Defense of Marriage Act: A Measure for Children and Families

Testimony before
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives

April 15, 2011

Charles A. Donovan
Senior Research Fellow
The Heritage Foundation

My name is Charles Donovan. I am Senior Research Fellow at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Introduction

The federal Defense of Marriage Act (DOMA) was passed in 1996 by wide margins in both houses of Congress and signed into law by President Clinton. It was enacted in response to an unprecedented state court decision that portended the possibility that the federal government and every other state in the Union would face legal challenges to the definition of marriage as the union of a man and a woman.[1]

Today, a decade and a half later, legal challenges to the nature of marriage have multiplied, and DOMA itself has come under challenge, including adverse rulings in federal district court last year in *Gill v. Office of Personnel Management* and *Massachusetts v. U.S. Department of Health and Human Services*. The purposes identified by Congress in enacting DOMA have not, however, diminished in any way. In fact, the public policy objectives served by DOMA are, if anything, more urgent than ever. Without doubt, they are rationally related to the fundamental objective of securing mothers, fathers, and children in their relationships to one another and assuring their opportunity to flourish individually and socially. Marriage is an indispensable avenue for that assurance.

During consideration of DOMA in 1996, the House Judiciary Committee's report to accompany the bill laid out four governmental interests that undergirded the legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.[2] Each of these interests is related to the public stake in the time-honored and nearly universal character of marriage as an institution designed to bring men and women together and orient them toward their responsibilities in the begetting, bearing, and raising of the next generation.

Four Governmental Interests Behind DOMA

Each of these interests offers a sturdy and even compelling basis for DOMA, and each persists today.

Speaking of the first interest, in his testimony to the House Judiciary Committee 15 years ago, Professor Hadley Arkes noted:

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[1] *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[2] H.R. Report 104-664, *Defense of Marriage Act*, Committee on the Judiciary, U.S. House of Representatives, July 9, 1996, at http://thomas.loc.gov/cgi-bin/cpquery/R?cp104:FLD010:@1(hr664) .

> We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, it is hard to detach marriage from what may be called the "natural teleology of the body": namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.
>
> These truths are as true today as they were then.

Professor Arkes might have added that we are, each of us, born of one man and one woman as well. Despite the developments in biotechnology that permit extra-uterine conception and surrogate gestation, every baby born today continues to represent the biological son or daughter of a man and a woman. Moreover, new studies have demonstrated that children born via the use of assisted reproduction technologies, who may be conceived via sperm or egg donation, or both, experience in large numbers a desire for knowledge about and even connection with the biological mother and/or father they have never met. This might be referred to as a "natural teleology of the family," an individual child's recognition that, whatever his or her parental relationships may be recognized as under the law, there is a natural and permanent biological template in which he or she is likely to have continuing emotional, psychological, and medical interest.[3]

The second interest behind DOMA, that of defending traditional notions of morality, is likewise an enduring one, which legislative bodies, responding to the public mind and its access to continuously developing information, are entrusted by our representative form of government to evaluate and act upon. The propriety of this trust is foundational to our republican form of government; it presumes the fundamental competence of the people to make laws that serve the common good and that protect the rights of minorities without depriving any person of essential rights. Nearly all laws represent some form of moral statement or public virtue, whether the topic is speed limits, clean energy credits, truth-in-lending, or even certain concepts of due process and equal protection. Courts that are tempted to strike down legislation that is rooted, in whole or in part, in moral judgments will be very busy indeed.

In 1996, an unprecedented state court ruling was enough to prompt a congressional review of the implications of a radical change in the definition of marriage for federal and state policy. The swift and clear response by Congress to this sudden challenge underscores the strength of the public consensus about the wisdom of retaining the core, traditional definition of marriage.

The recent decisions of several state supreme courts—including those of Massachusetts, Vermont, Connecticut, and Iowa—to mandate the creation of same-sex civil unions or marriage are at variance with the conclusions of nearly every authority

[3] Elizabeth Marquardt, Norval D. Glenn, and Karen Clark, "My Daddy's Name Is Donor: A New Study of Young Adults Conceived Through Sperm Donation," Institute for American Values, 2010.

that has weighed in with respect to this issue. "Until quite recently," as the defendant-appellants put it in their appeal brief in *Perry v. Schwarzenegger*, "the abiding link between marriage and society's existential interests in responsible procreation and child-rearing was routinely recognized, without a hint of controversy, not only by the California Supreme Court [] but by every state appellate court to address the purpose of marriage." The brief also notes that this has been the consistent conclusion of federal appellate courts to date and of the U.S. Supreme Court itself as early as 1972 in *Baker v. Nelson*.

Significantly as well, the decisions made by popular vote regarding the future of marriage in the United States have had a uniform outcome. Voters in 31 states have cast 63,394,399 ballots on the question of marriage redefinition since the people of Hawaii and Alaska went to the polls in 1998. More than 40,000,000 of those ballots—63.1 percent—have been cast to preserve marriage as it has always been understood by Congress and the vast majority of state legislatures.[4] No state's people have voted to the contrary. Finally, just last November, the voters of Iowa registered their resounding disapproval of the Iowa Supreme Court's invention of a constitutional right to same-sex marriage by removing all three of the judges on the statewide ballot who had signed the court's ruling.

The third interest represented by DOMA is rooted in our constitutional order. Section 2 of DOMA expresses the determination of Congress that no state shall be required to give effect to the decision of another state with respect to its law recognizing or refusing to recognize the marriage of persons of the same sex. The provision is a two-way street, guaranteeing states the liberty under their own laws, consonant with the beliefs of their own residents, to choose to recognize or not to recognize the decisions of any other state with respect to the definition of marriage in their own state. As this committee noted at the time of adoption of DOMA, this provision is a narrow one:

> It [does] not forestall or in any way affect developments in Hawaii, or, for that matter, in any other State. Indeed, nothing in this (or any other) section of the Act would either prevent a State on its own from recognizing same-sex "marriages," or from choosing to give binding legal effect to same-sex "marriage" licenses issued by another State.

At the same time states are free to choose their marriage policies, DOMA exercises the prerogative of the federal government to define marriage for purposes of federal law.

Finally, the fourth interest expressed by DOMA, the ability of Congress to exercise control over scarce government resources, is dramatically greater today than it was in 1996. In the same year that DOMA was adopted, the Congress adopted reforms of the federal welfare policy that were designed to encourage work, support marriage and family formation, and control exploding costs to taxpayers. This action was taken

[4] Tabulation by the author from state Web sites, Secretaries of State, or boards of elections (unpublished figures); see also *http://en.wikipedia.org/wiki/Same-sex_marriage_legislation_in_the_United_States*.

primarily as a result of congressional recognition of the deleterious effect three decades of burgeoning welfare spending had had not merely on the public purse, but on patterns of dependency among program recipients. With the assistance of this legislation, the public good of marriage was embraced, and an already shrinking federal deficit in 1996 was moved into balance in 1997 and surplus in 1998 and beyond.

Today, federal deficits and debt are widely recognized to be spiraling into uncharted territory. This is no time to sacrifice the power of the Congress to define and control federal expenditures related to employee benefits, tax preferences, and other purposes to the vagaries of states choosing to redefine marriage and family. The case for doing so is even less compelling when it is clear that Congress, acting on its own, is free to make decisions to define benefits and preferences that not only accord with budgetary imperatives, but also proceed without compromising the signal, which DOMA represents, that the preservation of the family unit is a matter of urgent national importance.

Moreover, and more profoundly, the promotion and preservation of intact (married mother-and-father) families bear financial implications for governments across a broad range of social indicators that carry enormous social costs. Children raised in intact families by their own mothers and fathers commit fewer crimes as juveniles, have fewer pregnancies and children out of wedlock, suffer less physical abuse, experience more educational success, resort less often to divorce, suffer less from substance abuse, and even shoplift less frequently.[5] Defending the core element of marriage, its one-man and one-woman character, is an indispensable part of defending the institution more generally and the public benefits it provides.

Conclusion: Marriage Uniquely Promotes Community and Intergenerational Goods

All of the governmental interests embodied in the Defense of Marriage Act ultimately serve one overarching purpose: to create and foster conditions of public policy that reinforce the binding of men and women to one another and to the children they co-create. Study after study of the impact of marriage and the sustained presence of mothers and fathers in the home, striving together and nurturing their children, demonstrate the advantages of a married mother and father over every other family form that has been exhaustively studied to date.

A June 2002 report from Child Trends titled "Marriage from a Child's Perspective" (Moore, Jekielek, and Emig) notes that the differences in child development outcomes are not simply related to differences between single-parent and two-parent households, but to "the presence of two biological parents."[6] These advantages are statistically significant, consistent, and often dramatic. Studies to examine whether

[5] Fact sheet, "Parental Involvement and Children's Well-Being," familyfacts.org, at *http://familyfacts.org/briefs/40/parental-involvement-and-childrens-well-being* (April 15, 2011).
[6] Kristin Anderson Moore, Ph.D., Susan M. Jekielek, M.A., and Carol Emig, M.P.P., "Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?" Child Trends, June 2002, at *http://www.childtrends.org/files/marriagerb602.pdf* (April 15, 2011).

parenting by same-sex couples would represent a unique exception to this finding remain controversial and incomplete. The prudence of Congress in protecting and promoting the maximum attachment of children to their natural mother and father should be respected.

Even if some studies were to show effects less than might be expected from previous research on the breakdown of mother–father families, the claim of children to the care and attention of the persons of the two sexes that were necessary to create them can and should be taken into consideration in public policy.

Indeed, that concern is, if anything, more urgent today than ever. Today's cultural shifts in cohabitation and out-of-wedlock childbearing, as well as persistent economic difficulties affecting Middle America, have combined to produce record numbers of children beginning life and being raised in single-parent households. In 2009, more than 1.7 million children—41 percent of all U.S. children who entered the world that year—were born to single mothers. The poverty rate among these children, if it holds with current patterns, will be nearly five times what it is for children with both a mother and a father in the home. Overall, nearly 70 percent of poor families with children are headed by single parents.[7]

The effects of family structure are not merely economic, and they are not therefore simply remedied by economic measures. The effects on children of being raised outside a biological family arrangement include greater risk of lower educational attainment, elevated rates of delinquency, more unwed pregnancy and childbearing, and other consequences. These aggregate findings do not spell the future of every single child raised in less than ideal family structures, but for those for which they do, they are very real indeed and the proper object of government concern.

For all of these reasons and more, concerned citizens and legislators have reacted with justifiable caution and even resistance to proposals to change the definition of marriage. They have reasonably concluded that these proposals have more to do with private preferences than they do with the public interest in community and intergenerational goods. The Defense of Marriage Act of 1996 is best seen, therefore, not as a measure singularly focused on a cultural debate occasioned by a state court decision, but as a response embedded within a growing awareness of the compelling public policy rationale to promote traditional marriage and encourage strong and stable homes where children can thrive and reach their full potential.

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[7] Robert Rector, "Married Fathers: America's Best Weapon Against Child Poverty," Heritage Foundation *WebMemo* No. 2934, June 6, 2010, at *http://www.heritage.org/Research/Reports/2010/06/Married-Fathers-Americas-Greatest-Weapon-Against-Child-Poverty*.

CONGRESSIONAL BUDGET OFFICE
U.S. Congress
Washington, DC 20515

Douglas Holtz-Eakin, Director

June 21, 2004

Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

At your request, the Congressional Budget Office has prepared the enclosed analysis of the potential budgetary effects of recognizing same-sex marriages.

If you wish further details on this analysis, we will be pleased to provide them. The CBO staff contacts are Roberton Williams (revenue effects), who can be reached at 226-2680, Jeanne De Sa (impact on Medicaid), who can be reached at 226-9010, and Kathy Ruffing (effects on Social Security and other benefits), who can be reached at 226-2820.

Sincerely,

Douglas Holtz-Eakin

Enclosure

cc: Honorable Jerrold Nadler
Ranking Member

Honorable F. James Sensenbrenner Jr.
Chairman
Committee on the Judiciary

Honorable John Conyers Jr.
Ranking Member

The Potential Budgetary Impact of Recognizing Same-Sex Marriages

June 21, 2004

The federal government does not recognize "marriages" of same-sex couples either for receipt of federal benefits or for tax purposes. The 1996 Defense of Marriage Act (Public Law 104-199) provides that the federal government will honor only marriages between one man and one woman. It also stipulates that no state, territory, or possession of the United States or Indian tribe can be required to recognize a same-sex marriage performed in any other jurisdiction.

The potential effects on the federal budget of recognizing same-sex marriages are numerous. Marriage can affect a person's eligibility for federal benefits such as Social Security. Married couples may incur higher or lower federal tax liabilities than they would as single individuals. In all, the General Accounting Office has counted 1,138 statutory provisions—ranging from the obvious cases just mentioned to the obscure (landowners' eligibility to negotiate a surface-mine lease with the Secretary of Labor)—in which marital status is a factor in determining or receiving "benefits, rights, and privileges."[1] In some cases, recognizing same-sex marriages would increase outlays and revenues; in other cases, it would have the opposite effect. The Congressional Budget Office (CBO) estimates that on net, those impacts would improve the budget's bottom line to a small extent: by less than $1 billion in each of the next 10 years (CBO's usual estimating period). That result assumes that same-sex marriages are legalized in all 50 states and recognized by the federal government.

The number of same-sex couples who would marry if they had the opportunity is unknown, but the 2000 census offers some insights. The census does not ask about sexual orientation, but it allows people living with a nonrelative to identify themselves as "partners" instead of "housemates/roommates." Almost 600,000 households (or 1.2 million people) identified themselves as same-sex partners in 2000, roughly half in male couples and half in female couples. They represented about 0.6 percent of the total adult population and almost 1 percent of people between the ages of 30 and 50.[2] By several common measures of stability—age, home ownership, and length of residence—those 600,000 same-sex couples

1. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (January 23, 2004).

2. By comparison, the 2000 census counted 54 million married-couple households and 4.9 million households with unmarried, opposite-sex partners. See Bureau of the Census, *Married-Couple and Unmarried-Partner Households: 2000*, Census 2000 Special Reports, No. CENSR-5 (February 2003).

resemble married couples more than they resemble other cohabiting households, so it seems reasonable to assume that many of them would marry if given the chance.[3] Some would not, of course; but other same-sex couples who did not live together, or who labeled themselves "roommates" rather than "partners" in the census, might choose to marry. The census also contained limited data about the income, earnings, and assets of those 600,000 couples—clues that CBO used to gauge budgetary impacts.

For the purposes of this analysis, CBO assumed that about 0.6 percent of adults would enter into same-sex marriages if they had the opportunity. (That proportion is equivalent to nearly 600,000 couples in 2000, with adjustment for subsequent population growth of about 1 percent a year.) CBO's estimates reflect significant uncertainty because predicting how many same-sex couples would marry is difficult and because data on their incomes, assets, and participation in federal benefit programs are sparse.

Effects on Revenues

Recognizing same-sex marriages would affect federal revenues through both the individual income tax and the estate tax. Neither effect would be large relative to total federal revenues. Receipts from other taxes—in particular, payroll taxes—would be unlikely to change significantly.

On balance, legalization of same-sex marriages would have only a small impact on federal tax revenues, CBO estimates. Revenues would be slightly higher: by less than $400 million a year from 2005 through 2010 and by $500 million to $700 million annually from 2011 through 2014. Those amounts represent less than 0.1 percent of total federal revenues.

The impact on revenues varies over time in part because, under current law, tax provisions will change in almost every year between now and 2011 and in part because incomes change over time. CBO's estimates are based on current law and assume that provisions in the Economic Growth and Tax Relief Reconciliation

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3. Before the 2000 census, researchers James Alm, M.V. Lee Badgett, and Leslie A. Whittington used a variety of sources (the National Health and Social Life Survey, the General Social Survey, and data from the National Opinion Research Center) to reach a similar estimate: that about 550,000 same-sex couples might marry. See Alm, Badgett, and Whittington, "Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage," *National Tax Journal*, vol. 53, no. 2 (June 2000), pp. 201-214. That study estimated that male couples would make up almost two-thirds of those marrying. By contrast, about two-thirds of the same-sex couples who wed in San Francisco; Portland, Oregon; and Massachusetts in early 2004 were female. See Evelyn Nieves, "The Women's Marriage March: Majority of Same-Sex Couples Who Took Vows Are Female," *Washington Post*, May 25, 2004, p. A3.

Act of 2001 (EGTRRA) and the Jobs Growth and Tax Relief Reconciliation Act of 2003 (JGTRRA) expire as scheduled rather than be extended.

The estimates are highly uncertain for several reasons. First, data from the 2000 census may not accurately represent the number of same-sex couples, both because of misreporting by respondents and because of misinterpretation of reported relationships by the Census Bureau. Second, how many same-sex partners would marry if allowed is unknown; CBO assumed that age and income would influence their decision, as appears to be the case for heterosexual couples. And third, allowing same-sex marriages could result in behavioral changes that would alter the number of gay and lesbian people in partnered relationships. Despite those uncertainties, however, CBO concluded that any effect of same-sex marriages on federal revenues would be small.

Income Tax Revenues

Recognizing same-sex marriages for federal tax purposes would require people in those marriages to file income tax returns as couples, either jointly or separately. For almost all married couples, filing jointly rather than separately results in lower tax liability. Depending on the division of income between spouses, marriage can lead to either higher income tax liability (a "marriage penalty") or lower liability (a "marriage bonus"). The greater the similarity in the two spouses' earnings, the more likely the couple is to incur a marriage penalty. Conversely, the greater the disparity in earnings, the more likely the couple is to receive a marriage bonus. When one spouse earns all of a couple's income, the couple always gets a bonus.

Together, EGTRRA and JGTRRA will reduce the number of couples incurring marriage penalties and increase the number receiving bonuses between now and 2010. JGTRRA provided relief from marriage penalties for 2003 and 2004 in the form of a higher standard deduction and broader 15 percent tax bracket for married couples. For 2005 through 2010, that relief is first reduced and then reinstated under the provisions of EGTRRA. Because of those changes and rising real (inflation-adjusted) incomes, marriage penalties would dominate during that period, and same-sex marriages would increase revenues by between $200 million and $400 million each year. After 2010, the expiration of all of EGTRRA's provisions would raise marriage penalties further, and revenues would be $500 million to $700 million higher each year than they would be if same-sex marriages were not recognized. (Permanently extending the marriage-penalty provisions in EGTRRA would reduce those revenue gains to less than $400 million per year after 2010.)

Estate Tax Revenues

A second effect of same-sex marriages on federal revenues could come through the estate tax, but that effect is almost certain to be small. Little is known about

the estate taxes that same-sex couples pay under current law. However, the effect of allowing same-sex marriages can be gauged by assuming that the partners would behave like other couples in terms of leaving inheritances.

The main impact of same-sex marriages on estate taxes would come through the unlimited spousal exemption, which allows a person to leave any amount of assets to his or her spouse without incurring estate tax liability. As a result, wealthy married couples can exempt twice as much wealth from estate taxes as single people can and thus can often pay lower estate taxes than they would if they were unmarried.[4] Furthermore, marriage can defer the payment of estate taxes until the death of the second spouse, thus shifting revenues into later years. Because the estate tax is scheduled to decline steadily through 2010 and then return abruptly to its pre- 2001 levels, that shift could increase revenues by moving taxation from a relatively low-tax year (through 2010) into a higher-tax year (after 2010). Extending the estate tax provisions of EGTRRA beyond 2010 would eliminate that possible revenue gain.

Notwithstanding those complexities, under current law, allowing same-sex marriages would have little impact on estate tax liabilities. That conclusion assumes that same-sex married couples would behave similarly to heterosexual married couples in terms of how they bequeathed their estates. If they behaved differently, however, allowing same-sex marriages could have different effects on estate tax revenues. For example, anecdotal evidence suggests that gay decedents currently leave more of their assets to charitable institutions than their heterosexual counterparts do. If allowing same-sex marriages caused that behavior to change—for example, if same-sex couples had more children to whom they left their estates—revenues could rise. Currently, about one in three lesbian couples and one in five gay couples live in a household with their own children.[5] Those proportions might rise if same-sex marriages were legalized.

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4. That effective doubling of the exemption occurs as follows: when the first spouse dies, he or she can pass on to heirs other than the surviving spouse an amount equal to the single exemption without owing estate tax. The balance of the estate goes to the surviving spouse, also without tax because of the unlimited spousal exemption. When the second spouse dies, an additional amount equal to the single exemption goes to heirs, again without tax. The couple thus has an effective exemption equal to twice the single exemption. If each spouse has assets of his or her own exceeding the exemption, marriage will have no effect on estate tax liability, other than on the timing of tax receipts. But if the assets of one spouse exceed the exemption and those of the other spouse do not, marriage will result in a higher combined exemption.

5. Bureau of the Census, *Married-Couple and Unmarried-Partner Households: 2000*, Table 4, p. 9.

Effects on Outlays

Marital status has a direct impact on people's eligibility for some federal payments, such as Social Security benefits, veterans' benefits, and civil service and military pensions. It can affect other benefits indirectly if a spouse's income and assets enter into determinations of eligibility. The discussion below focuses on so-called mandatory, or direct, spending—programs like Social Security that make payments to anyone who is qualified and applies—because the budgetary effects on those programs of recognizing same-sex marriages would occur automatically and would not depend on future annual appropriations.

Recognizing same-sex marriages would increase outlays for Social Security and for the Federal Employees Health Benefits (FEHB) program, CBO estimates, but would reduce spending for Supplemental Security Income (SSI), Medicaid, and Medicare. Effects on other programs would be negligible. Altogether, CBO concludes, recognizing same-sex marriages would affect outlays by less than $50 million a year in either direction through 2009 and reduce them by about $100 million to $200 million annually from 2010 through 2014.

Social Security

With estimated payments of $488 billion in 2004, Social Security is both the largest federal program and the one in which marital history plays the greatest role in determining benefits. Under Social Security rules:

- The spouse of a retired or disabled worker—assuming that he or she meets age and other requirements—can receive 50 percent of the worker's benefit, subject to reductions for early retirement (before age 65 or, eventually, age 67) and, if children are also eligible, subject to a cap on total family benefits. Thus, the basic benefit for a married couple with one earner is 1.5 times that for an unmarried worker with the same work history.

- The widow or widower of an insured worker—again, if he or she meets age and other requirements—can receive 100 percent of the worker's benefit.

- Divorced spouses can collect either type of benefit described above if they were married to an eligible worker for at least 10 years.[6]

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6. Relatively few people collect on an ex-spouse's record: about 375,000 spouses and 625,000 widow(er)s did so in December 2002 (including those who were eligible for smaller benefits in their own right) out of a total of 46 million Social Security recipients. The 10-year requirement clearly limits that number. More than half of marriages that end in divorce do so before the couple's eighth anniversary, according to Bureau of the Census, *Number, Timing, and Duration of Marriages and Divorces: 1996*, Current Population Reports, P70-80 (February 2002), Table 6, p. 12.

If a spouse or widow(er) has worked long enough (generally 10 years) to earn retired- or disabled-worker benefits on his or her own, Social Security does not pay both benefits. Instead, it pays the larger of the two amounts for which the recipient is eligible. Technically, such people are labeled "dually entitled" and receive their own benefit plus the excess, if any, of their other benefit.

As a general rule, married people fare better under Social Security than single people do, and married couples with one earner fare better than two-earner couples do. One-earner couples get an extra 50 percent of the worker's check while both spouses are alive and a lifetime benefit if the worker dies first. (In a typical pension plan, by contrast, benefits stop at the worker's death unless he or she chose a reduced, joint-and-survivor annuity.) Two-earner couples gain less from the spousal benefit because it may exceed the lower earner's own benefit by little or nothing.[7] But even in two-earner couples, the husband typically earns more and dies first, and his widow gets his higher benefit for life. People who never marry do not gain from those provisions.

Benefits paid to spouses and widow(er)s account for almost one-fifth of Social Security spending. In 2004, $21 billion in benefits will go to 5.5 million spouses and $69 billion to 8 million aged widows and widowers, CBO estimates. Almost half of those recipients are dually entitled.[8]

If permitted to marry, same-sex couples would benefit from those spousal and survivor features. However, their gains would be modest, CBO expects, for two reasons. First, most same-sex couples include two workers, and on average, their earnings are closer to one another's than is the case for a husband and wife in a two-earner couple. Second, same-sex partners would generally collect survivor benefits for a shorter period. On average, such partners are the same age, and statistically they have the same life expectancy. By contrast, husbands are an average of two to three years older than their wives, earn more, and have a shorter

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7. As a rule of thumb, the lower earner—usually the wife—will not receive a spousal benefit if she earned at least one-third as much as her husband over their lifetimes, because her own benefit will be higher. That outcome stems from the weighted formula used to calculate benefits. Social Security bases benefits on a worker's highest 35 years of earnings and aims to "replace" more earnings for a lower-paid worker than for a higher-paid one. Thus, a worker who earned an average of $4,500 a month (in today's dollars) might get a benefit of about $1,655 a month (before any reductions for early retirement), and a worker who earned only one-third as much ($1,500 a month, on average) would qualify for a basic monthly benefit of $835—more than half of the higher earner's amount.

8. The most readily available figures from the Social Security Administration show far fewer spouse and widow(er) recipients—about 2.8 million and 4.6 million, respectively. That is because dually entitled people are already included among retired workers and disabled workers, so listing them again would constitute double-counting. Adding an estimated 2.7 million dually entitled spouses and 3.6 million dually entitled widow(er)s yields the totals cited above. For more information, see Social Security Administration, *Annual Statistical Supplement* (various years), Table 5G2.

life expectancy. An average married woman can expect to spend six or seven years as a widow.

From analyzing the joint earnings (and Social Security income, if applicable) of the same-sex partnerships in the 2000 census, CBO judges that only 30 percent would receive higher benefits as a retired couple than they would as two single people. And about half of same-sex couples would collect higher benefits after one partner died than they would under current law. Taking into account the age mix and expected mortality of same-sex couples, CBO estimates that additional Social Security benefits would total about $50 million in 2005 and grow to $350 million in 2014 (equivalent to $250 million in today's dollars, adjusted for intervening wage growth and cost-of-living increases).

That additional cost is small in the near term and grows over time as the couples age. According to the census, the average member of a same-sex couple in 2000 was in his or her early 40s. In only about 10 percent of partnerships were both partners age 62 or older, the earliest age for receiving Social Security retirement benefits. In the next few decades, many more couples will reach age 62, and some members will die, leaving their survivors eligible for widow(er)s' benefits if their marriages were recognized.

Children—chiefly the minor children of workers who have died—account for about 5 percent of Social Security benefits. Although large numbers of same-sex partners in the 2000 census were raising children, CBO estimates that allowing same-sex marriages would not add significantly to those benefits. Children may qualify for benefits on the earnings record of a biological or adoptive parent; the parent's marital status does not matter. Even if same-sex marriages led to more adoptions by such couples, the children involved would essentially replace one set of parents (their biological parents) with another (their adoptive parents). The two sets of parents might differ in key respects such as mortality and earnings, but any net effect on Social Security benefits for their children would most likely be small.

Finally, some recipients face marriage penalties in Social Security. Disabled adult children—grown children whose disability (usually mental retardation) occurred before age 22 and who therefore collect on a parent's record—lose their benefits if they marry. Widows and widowers who remarry before age 60 lose their former eligibility, although they may reclaim it if the remarriage ends in death or divorce. Same-sex marriages would trigger those penalties in a handful of cases, but CBO expects that such effects would be negligible.

Other Federal Programs
Although Social Security is the program that would be most obviously affected by changes in marital status, legalization of same-sex marriage would also change federal spending for various income-support and health programs.

Supplemental Security Income. Partners who now collect benefits from SSI—a means-tested program for the elderly and disabled—could lose some or all of their benefits if same-sex marriages were recognized, because their spouse's income and assets as well as their own would count toward their eligibility. In almost 25,000 (about 4 percent) of the same-sex partnerships reported in the 2000 census, one or (rarely) both partners received SSI benefits. Those participants would be unlikely to marry, but some would. More plausibly, partners who do not now collect SSI benefits would find their future applications rejected because of their spouse's income. As a result, legalization of same-sex marriages would save the SSI program about $100 million a year by 2014, CBO estimates.

Medicaid. A joint federal/state program, Medicaid provides health coverage to some poor elderly and disabled people, children, and families. The federal share of spending will reach an estimated $174 billion this year and $352 billion in 2014. CBO expects about 58 million enrollees in 2014—18 million elderly and disabled people and 40 million other adults and children.

As with SSI, eligibility for Medicaid is generally linked to income and assets, so counting a spouse's resources could make some individuals ineligible. Participation in SSI generally confers Medicaid eligibility, which means that some people who lost SSI benefits would also lose Medicaid coverage. Other elderly and disabled individuals (including a small number of nursing-home residents) who qualify for Medicaid under current law could also lose eligibility if a couple's combined incomes and assets were considered. The extent to which people lost coverage would vary among states depending on the degree to which states disregard assets and income. By 2014, about 30,000 fewer elderly and disabled individuals would have Medicaid coverage than under current law, CBO estimates.

Counting a spouse's income and assets would likewise push some welfare recipients and other poor families above Medicaid's eligibility limits. Although an increase in family size could boost some families' chances of qualifying, the prevailing effect of combining incomes would be to reduce Medicaid eligibility. Most of the people losing Medicaid coverage would be children. Because parents face tighter eligibility rules than children do in most states, fewer of them are eligible for the program. In a same-sex couple in which one partner has little or no income, his or her children may qualify for Medicaid under current law. Those children could lose Medicaid coverage if both partners' incomes were considered

in determining eligibility.[9] Furthermore, same-sex marriages might make some children who would otherwise be enrolled in Medicaid eligible for health insurance through an adoptive parent's or stepparent's employer. Such children might shift from Medicaid to private coverage. CBO estimates that by 2014, about 100,000 fewer children and their parents would have Medicaid coverage than under current law.

Conversely, Medicaid spending could increase for a small number of nursing-home residents. Under special rules for spouses living in the community—the so-called spousal impoverishment exemption—a noninstitutionalized spouse may shield a home and some other jointly owned assets from Medicaid's resource limits. Recognizing same-sex marriages would allow couples to protect more assets than they could as individuals (under current law) and thus shrink their expected contribution to the cost of nursing-home care.

In all, CBO expects, federal spending for Medicaid would decline by about $400 million (or about 0.1 percent) in 2014 because of same-sex marriages and by smaller amounts in earlier years. Because states pay about 43 percent of the program's total costs, they would realize savings of about $300 million in 2014.

Medicare. Savings would also occur in the new Medicare prescription drug benefit's low-income subsidy program. Under current law, people who meet certain income and asset tests are eligible to receive government subsidies for their cost-sharing payments and premiums for the drug benefit. Some of those people would no longer qualify if the income and assets they shared with a partner were considered for eligibility purposes. The resulting savings for Medicare would amount to less than $50 million a year through 2014, CBO estimates.

Federal Employees Health Benefits Program. By recognizing same-sex marriages, the government would automatically extend health care insurance under the FEHB program to civil servants and civil service retirees who elected to cover a spouse. Under that program, the government pays almost three-quarters of health care premiums, and employees and annuitants pay the rest. The government's payments for annuitants constitute direct spending (spending that does not require an annual appropriation). CBO estimates that covering the same-sex spouses of retired enrollees in the FEHB program would cost the government less than $50 million a year through 2014. Premiums for current employees, by contrast, come from agencies' salary and expense budgets, which are funded by appropriations.

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9. Even if a child is related by blood or adoption to only one of the spouses—for example, if the child was born during a previous marriage—most states consider a stepparent's income and resources when determining the child's eligibility for welfare and Medicaid. Some stepparents, though, could newly gain Medicaid coverage, depending on their states' rules.

CBO expects that those additional premiums would cost agencies less than $30 million annually through 2014.[10]

Food Stamps and Other Programs. In the Food Stamp program, the basic unit is the household (people who live together and usually buy and prepare food together), not necessarily the family. Thus, CBO expects that recognizing same-sex marriages between partners who already live together would not affect Food Stamp spending.

In addition, the costs or savings for veterans' benefits, civil service retirement, and military retirement would be negligible if the federal government recognized same-sex marriages, CBO estimates.

10. In 2003, CBO analyzed the Domestic Partnership Benefits and Obligations Act of 2003, a bill that would expand certain fringe benefits—notably health insurance—to "domestic partners" of federal civilian employees. CBO estimated that 83 percent of the potential beneficiaries would be people in opposite-sex rather than same-sex partnerships. At the sponsor's request, CBO confined its analysis to current federal employees, not retirees. See Congressional Budget Office, *Cost Estimate for H.R. 2426, the Domestic Partnership Benefits and Obligations Act of 2003* (August 4, 2003), available at www.cbo.gov.

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DOMA Is Unconstitutional

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A central question in the legal debate over the constitutionality of laws that discriminate against gays and lesbians (such as the federal Defense of Marriage Act) turns on the appropriate standard a court should apply in deciding whether the government's interest in treating gays and lesbians differently from other Americans is sufficiently weighty to justify the discrimination.

The Equal Protection Clause of the Fourteenth Amendment, which provides that no state shall deny any person "the equal protection of the laws," is the relevant constitutional text. But what does it mean?

A simple interpretation might suggest that the government may never treat people differently. But that is an implausible understanding of the text. All laws treat people differently. Speed limit laws treat people who drive 75 miles per hour differently than those who drive 45 miles per hour. People who have gone to medical school can practice medicine; others cannot. Citizens can vote; aliens cannot. In-state college students pay a lower tuition than out-of-state college students. People over 65 receive certain benefits that are not available to people under 65. And so on.

Surely, the Equal Protection Clause cannot mean that all such laws are unconstitutional. Recognizing this, the Supreme Court has held that most laws that treat some people differently from others are constitutional if the difference in treatment rationally furthers a legitimate government interest. As illustrated by the examples noted above, almost all laws pass this test.

But this does not exhaust the meaning of the Equal Protection Clause. The primary goal of the Clause, which was enacted in the wake of the Civil War, was to prohibit laws that discriminate against African-Americans. To effectuate that purpose, the Supreme Court has held that laws that discriminate against African Americans violate the Equal Protection Clause unless they pass "heightened scrutiny" -- that is, unless the discrimination is necessary to further an important government interest.

But is heightened scrutiny limited only to laws that discriminate against African Americans? That would be odd, because the text says nothing about limiting its core protection to African Americans. Rather, the text is open-ended, and it is therefore reasonable to assume that discrimination against African Americans was seen not as a singular problem, but as a paradigmatic one. That is, it is the paradigm of a certain type of discrimination that is especially problematic under the Equal Protection Clause.

Applying this understanding, the Supreme Court has concluded that the proper application of the Clause requires the use of heightened scrutiny to test the constitutionality of laws that discriminate against African-Americans or that discriminate against other groups in society that are similar to African Americans for purposes of the Equal Protection Clause.

What, though, does it mean to be "similar to African Americans for purposes of the Equal Protection Clause"? The Supreme Court has looked to several factors. First, it considers whether the group has been subjected to a history of discrimination. This is relevant both because such a history suggests that there may be prejudices at work in society that can taint the fairness of the political process, and because it is particularly unfair to heap additional burdens on groups that have been systematically discriminated against in the past.

Second, the Court considers whether the group can effectively protect itself in the political process. If a group does not have that ability, then it is especially vulnerable to the pernicious effects of prejudice and intolerance.

Third, the Court considers whether the group is objectively different in some meaningful way that would logically justify treating its members differently than others. For example, it is sensible to treat people born with severe learning disabilities differently in some ways than others, but it is not sensible to assume that race is relevant to an individual's capacity to function fully in society.

Finally, the Court considers whether the group's status is immutable. That is, African Americans cannot change their race. Therefore, laws that discriminate against African Americans are particularly unjust, because it is unfair to disadvantage people for characteristics that are largely beyond their control.

Considering all these factors, the Supreme Court has concluded, for example, that laws that discriminate against ethnic minorities and women are sufficiently similar to laws that discriminate against African Americans to justify testing them by heightened scrutiny.

What, though, of gays and lesbian? How do they fare under this analysis? The first three criteria seem clear. There can be no doubt that gays and lesbians have been subjected to a long and often tragic history of discrimination -- even to the point that they were declared to be criminals. They are certainly a political minority, even more so than African Americans and women, and historically they have been particularly powerless politically because they were forced into the closet and were therefore effectively unable to represent their interests in the political process. And there is no reason to believe that gays and lesbians are any less able to function well in

society than anyone else -- even to the point that they are now permitted to serve openly in the military.

The only criteria on which there is any question is the fourth, but there is a general consensus today that one's sexual orientation is not a matter of choice. Although there are those who dispute this proposition, the great weight of the evidence cuts the other way. If you are a heterosexual, imagine if you suddenly had to lead your life as a homosexual. All of your instincts would cut strongly in the opposite direction. You might be able to force yourself to engage in sex with people of the same sex, but it would seem wholly unnatural and, more importantly, you would continue (secretly) to be attracted to persons of the opposite sex, even if you could no longer legally act on those attractions. This is pretty much what sexual orientation means, and in its deepest sense the orientation itself seems to be beyond one's own control. One can (perhaps) change one's conduct, but not one's orientation.

Thus, like laws that discriminate against African Americans, ethnic minorities and women, laws that discriminate against gays and lesbians must be tested by heightened scrutiny under the Equal Protection Clause. And, as a practical matter, tested by that standard, it is difficult to think of any interest furthered by the Defense of Marriage Act that would enable that misguided law to pass constitutional muster.

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Opinion

No defending the Defense of Marriage Act

The author of the federal Defense of Marriage Act now thinks it's time for his law to get the boot -- but for political reasons, not in support of gays.

By Bob Barr

January 5, 2009

In 1996, as a freshman member of the House of Representatives, I wrote the Defense of Marriage Act, better known by its shorthand acronym, DOMA, than its legal title. The law has been a flash-point for those arguing for or against same-sex marriage ever since President Clinton signed it into law. Even President-elect Barack Obama has grappled with its language, meaning and impact.

I can sympathize with the incoming commander in chief. And, after long and careful consideration, I have come to agree with him that the law should be repealed.

The left now decries DOMA as the barrier to federal recognition and benefits for married gay couples. At the other end of the political spectrum, however, DOMA has been lambasted for subverting the political momentum for a U.S. constitutional amendment banning same-sex marriage. In truth, the language of the legislation -- like that of most federal laws -- was a compromise.

DOMA was indeed designed to thwart the then-nascent move in a few state courts and legislatures to afford partial or full recognition to same-sex couples. The Hawaii court case Baehr vs. Lewin, still active while DOMA was being considered by Congress in mid-1996, provided the immediate impetus.

The Hawaii court was clearly leaning toward legalizing same-sex marriages. So the first part of DOMA was crafted to prevent the U.S. Constitution's "full faith and credit" clause -- which normally would require State B to recognize any lawful marriage performed in State A -- from being used to extend one state's recognition of same-sex marriage to other states whose citizens chose not to recognize such a union.

Contrary to the wishes of a number of my Republican colleagues, I crafted the legislation so it wasn't a hammer the federal government could use to force states to recognize only unions between a man and a woman. Congress deliberately chose not to establish a single, nationwide definition of marriage.

However, we did incorporate into DOMA's second part a definition of marriage that comported with the historic -- and, at the time, widely accepted -- view of the institution as being between a man and a woman only. But this definition was to be used solely to interpret provisions of federal law related to spouses.

The first part of DOMA, then, is a partial bow to principles of federalism, protecting the power of each state to determine its definition of marriage. The second part sets a legal definition of marriage only for purposes of federal law, but not for the states. That was the theory.

I've wrestled with this issue for the last several years and come to the conclusion that DOMA is not working out as planned. In testifying before Congress against a federal marriage amendment, and more recently while making my case to skeptical Libertarians as to why I was worthy of their support as their party's presidential nominee, I have concluded that DOMA is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law.

In effect, DOMA's language reflects one-way federalism: It protects only those states that don't want to accept a same-sex marriage granted by another state. Moreover, the heterosexual definition of marriage for purposes of federal laws -- including, immigration, Social Security survivor rights and veteran's benefits -- has become a de facto club used to limit, if not thwart, the ability of a state to choose to recognize same-sex unions.

Even more so now than in 1996, I believe we need to reduce federal power over the lives of the citizenry and over the prerogatives of the states. It truly is time to get the federal government out of the marriage business. In law and policy, such decisions should be left to the people themselves.

In 2006, when then-Sen. Obama voted against the Federal Marriage Amendment, he said, "Decisions about marriage should be left to the states." He was right then; and as I have come to realize, he is right now in concluding that DOMA has to go. If one truly believes in federalism and the primacy of state government over the federal, DOMA is simply incompatible with those notions.

Bob Barr represented the 7th District of Georgia in the House of Representatives from 1995 to 2003 and was the Libertarian Party's 2008 nominee for president.

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The DOMA Decision

Obama's action was not unprecedented, but it was still nothing less than bold.

Walter Dellinger

March 1, 2011 | 12:00 am

I had thought that everything useful had already been said about the president's determination that the Defense of Marriage Act (DOMA) could no longer be defended. Then, I saw the statement by former Speaker of the House Newt Gingrich. He said that the Obama administration "didn't understand the implication that having a president personally suspend a law is clearly unconstitutional" and urged Congress to defund the Office of the Attorney General unless the president reverses his decision.

That statement, from a leader possibly on the cusp of declaring his candidacy for the presidency, is so far off the mark that it calls out for additional clarification about exactly what the president and the attorney general did—and did not—do.

First, the president did not "suspend a law." Far from it. The attorney general's announcement makes clear that the administration, in fact, will continue to enforce and abide by DOMA, in spite of the president's objections to it. What's different now is that the administration will inform the courts of its view that the law is unconstitutional and should be struck down. Unless and until the judiciary makes such a determination itself, however, the administration will continue to comply with the law.

There are a few, narrow circumstances in which a president is justified in announcing a unilateral decision that he will not comply with a law he believes to be unconstitutional. This is not such a case. Here, the president has decided to comply with the law and leave the final decision of its constitutionality to the courts, a course of action that respects the institutional roles of both Congress, which passed the law, and the judicial branch.

This is not to say that Obama's decision was anything less than bold. While such an action is not unprecedented (the Clinton administration announced it would not defend a law ousting all HIV-positive individuals from the military), it's only been about once a decade since World War II that the executive branch has declined to defend an act passed by Congress.

Why is that action justified here? In large measure, it was driven by the unacceptability of the arguments that the government would otherwise have had to make in DOMA-related cases in which filings will soon be due. Those who have criticized the decision not to defend DOMA—a group that includes even some who favor same-sex marriage, like former Solicitor General

Charles Fried—have given too little consideration to what a brief defending the law would have to say, and what a brief declining to defend could say instead.

The next brief the government would have had to file in DOMA litigation, were it defending the law, would have been in the Second Circuit, and the question that court would have had to address for the first time is the level of judicial scrutiny that should be accorded discriminations based on sexual orientation. Although the issue seems technical—should "rational basis" or "heightened scrutiny" be applied—it in fact addresses very profound questions about the role of sexual orientation in our culture.

Here is a common language, common sense version of the issue: Courts generally *assume* that the distinctions legislatures make between one group and another are validly based on criteria that go to genuine merit. Courts don't second-guess legislatures about the decision to base laws on such distinctions. Such laws are assumed to be the result of a fair-minded process and based on appropriate considerations. If such a distinction looks "rational" to a court, that is close enough for government work.

A few distinctions—notably race, religion, and gender—have been subject to heightened scrutiny by the courts. The reason for the courts treat such distinctions with skepticism is because they have each been (mis)used historically as a basis for legislation even though they are not good indicators of merit and have little relation to legitimate policy objectives. Such distinctions are often employed by legislatures because of bias or hostility against a group that has historically be subject to discrimination. Thus, judges are supposed to view these distinctions skeptically in order to identify instances in which such discriminations are based on bias rather than merit.

Into which category should sexual orientation discrimination be placed—those needing only a rational basis or those subject to heightened scrutiny? That would have been the issue facing the Justice Department in the next brief to be filed. The problem was not simply that the president and the attorney general had constitutional doubts about DOMA—that is true of a lot of laws that the department sucks it up to defend. The problem was that to mount the fullest defense of DOMA, the government would have to argue against subjecting the law to heightened scrutiny. And, to make that argument, it would have been necessary to urge the court to accept two propositions that are profoundly wrong: the notion that distinctions based upon sexual orientation are generally sound judgments based on merit, and the assumption that bias or hostility was unlikely to have played a role.

I don't believe that any administration is obliged to urge a court to accept propositions that the president believes are fundamentally wrong, as surely these propositions are. The far better course was to make this one of those rare instances in which the government gives the court its honest view on fundamental questions, even if those views could lead to the law being invalidated. And that's exactly what the administration did: Because of Obama's decision last week, the government will issue a brief setting out its view that DOMA is unconstitutional.

Obama's decision was honest, transparent, and respectful of the rule of law. The briefs the administration will file on this issue going forward will give the court the benefit of the Justice

Department's best thinking. At the same time, the government will not be "pretending" or "purporting" to support the law—and, thus, the judges will know to look elsewhere for the most all-out, no-holds-barred defense of the law in question.

It is easy to sit on the sidelines and say that the government should always "defend the law." But those who would defend *this* law, perhaps including even the House leadership, will find that doing so requires them to argue that discrimination against individuals or couples on the basis of their sexual orientation is generally reflective of merit, not bias. The courts ought to hear that view from someone, but it should not be from this president and his law officers.

The judiciary will be exposed to all the best arguments on both sides of this question, and, in the end, it will make the final decision about DOMA's constitutionality. But make no mistake about the importance of what Attorney General Holder and President Obama have done: They have placed the executive branch of the government of the United States firmly behind the proposition that discrimination based on sexual orientation is wrong. History will be kind to this decision.

Walter Dellinger is a partner at O'Melveny & Myers, LLP in Washington, D.C.

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April 14, 2011

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The Honorable Jerold Nadler (D-NY)
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RE: ACLU Statement for Constitution Subcommittee Hearing on "Defending Marriage"

Dear Chairman Franks and Ranking Member Nadler:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to offer a statement on the subcommittee's hearing entitled "Defending Marriage." Since the first lawsuit for same-sex couples in 1972, the ACLU has been at the forefront of legal, legislative, and public education efforts to secure marriage for same-sex couples and win legal recognition for LGBT relationships.

When the so-called "Defense of Marriage Act" (DOMA) (Public Law 104-199) was passed by Congress and signed into law in 1996, gay and lesbian couples could not legally marry in any state, and it was not until 2000 that Vermont made national headlines with its civil unions law. Today, gay and lesbian couples can legally marry in five states – Connecticut, Iowa, Massachusetts, New Hampshire and Vermont – as well as the District of Columbia. There are an estimated 18,000 legally-married same-sex couples in California who married in 2008 prior to the passage of Proposition 8 and whose marriages are still recognized by the state. In addition, Maryland and New York legally recognize out-of-state-marriages of same-sex couples. Numerous additional states have relationship recognition laws such as civil unions and domestic partnerships that, while falling short of marriage, afford

gay and lesbian couples a measure of recognition and protections for their families.

It may be self-evident, but America is a much different country for same-sex couples than it was in 1996. Today, a recent study from the Williams Institute at UCLA's School of Law put the number of legally-married same-sex couples in the US at between 50,000-80,000. With greater visibility comes a higher rate of acceptance, which has proven true in this context as well. A March 2011 poll from the *Washington Post* and ABC News found, for the first time ever, that a majority of Americans (53 percent) favored legalizing marriage for gay and lesbian couples.

While lesbian, gay, bisexual and transgender (LGBT) Americans have made many remarkable strides over the last 15 years, the discriminatory Defense of Marriage Act denies all of the legally-married same-sex couples and their families in this country each of the more than 1,100 federal benefits and protections (e.g. Social Security survivor benefits) identified by the Government Accountability Office that are afforded to all married couples, but denied to tens of thousands of legally-married Americans simply based on their sexual orientation. DOMA causes these married couples and their families real harm each and every day.

Edith "Edie" Windsor and Thea Spyer

These couples include people like 81-year-old ACLU client Edie Windsor. Edie Windsor and Thea Spyer shared their lives together as a couple in New York City for 44 years. They got engaged in 1967, a couple of years after becoming a couple, and were finally married in Canada in May 2007. Two years later, after living for decades with multiple sclerosis, which led to progressive paralysis, Thea passed away.

When Thea died, the federal government, because of DOMA, refused to recognize their marriage and taxed Edie's inheritance from Thea as though they were strangers. Under federal tax law, a spouse who dies can leave her assets, including the family home, to the other spouse without incurring estate taxes. For the simple fact that Edie was married to woman instead of a man, she had to pay a $363,000 federal estate tax that would have otherwise been $0.

Ordinarily, whether a couple is married for federal purposes depends on whether they are considered married in their state. New York recognized Edie and Thea's marriage, but because of DOMA, the federal government refuses to treat married same-sex couples, like Edie and Thea, the same way as all other married couples. After decades together, including many years during which Edie helped Thea through her long battle with multiple sclerosis, it was devastating to Edie that the federal government refused to recognize their marriage.

In February 2011, in response to a lawsuit brought by the ACLU, the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, and the New York Civil Liberties Union on Edie Windsor's behalf, the Obama administration concluded that Section 3 of DOMA, which bars the federal government from recognizing the legal marriages of same-sex couples, is unconstitutional and stated that the Department of Justice would no longer defend the law in court. In response, House Speaker John Boehner (R-OH) announced that the House of Representatives would intervene to defend DOMA in court.

Defend Marriage by Respecting *ALL* Legal Marriages

Rather than using scarce resources to defend a discriminatory and unconstitutional law that does little to "defend" marriage, but denies tens of thousands of families equal protection under the law, Congress should repeal DOMA once and for all and provide federal protections for married same-sex couples by recognizing marriages that are already recognized by states. Legislation pending in both the House and Senate – the Respect for Marriage Act (H.R. 1116 and S. 598) – would repeal DOMA in its entirety, as well as provide all married couples certainty that regardless of where they travel or move in the country, they will not be treated as strangers under federal law. This legislation would return the federal government to its historic role in deferring to states in determining who could marry and be considered married.

The Respect for Marriage Act is federal legislation that affects the federal government only. It is important to note that nothing in the proposed Respect for Marriage Act forces a state to recognize a valid marriage performed by another jurisdiction, and nothing in it obligates any person, religious organization, locality, or state to celebrate or license a marriage between two persons of the same sex. This legislation would, however, end the unconscionable denial of equal treatment under federal law to lawfully married same-sex couples and their families.

As an indication of just how much has changed since 1996, both former Representative Bob Barr (R-GA), the congressional author of DOMA, as well as President Bill Clinton have called for DOMA's repeal and passage of the Respect for Marriage Act. Former President Clinton said, "When the Defense of Marriage Act was passed, gay couples could not marry anywhere in the United States or the world for that matter. Thirteen years later, the fabric of our country has changed, and so should this policy."[1] Former Representative Barr remarked that the Respect for Marriage Act would "remove the federal government from involving itself in matters of defining 'marriage,' which historically and according to principles of federalism, are properly state matters and not federal."[2]

The Respect for Marriage Act currently has the support of 110 members of the House and nearly 20 in the Senate. A Congress that is genuinely concerned with the defense of marriage could do no better than extending the 1,100 federal benefits and protections to all of the 50,000-80,000 legally-married same-sex couples and their families across the country. Someone like Edie Windsor who spent a committed lifetime with her spouse and partner should not be punished by the federal government simply because of who she loved and spent her life with. The ACLU urges you to support *all* married couples by passing the Respect for Marriage Act (H.R. 1116 and S. 598).

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[1] The Respect for Marriage Act Garners Support of President Clinton and Former Rep. Bob Barr, DOMA's Original Author, http://nadler.house.gov/index.php?option=com_content&task=view&id=1307&Itemid=115 (September 2009 Press Release)

[2] *Id.*

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Christopher E. Anders
Senior Legislative Counsel

Ian S. Thompson
Legislative Representative

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution
Hearing on "Defending Marriage"
Written Testimony of Joe Solmonese
President, Human Rights Campaign
April 14, 2011

On behalf of the Human Rights Campaign and our more than one million members and supporters nationwide, thank you for the opportunity to offer this statement on the subcommittee's hearing entitled "Defending Marriage." As the nation's largest civil rights organization advocating for the lesbian, gay, bisexual and transgender (LGBT) community, the Human Rights Campaign strongly opposes the discriminatory Defense of Marriage Act (DOMA), an Act of Congress that bars federal recognition of the lawful marriages of gay and lesbian couples. DOMA, and the Department of Justice's decision to cease defending Section 3 of that statute against constitutional challenges, is at the core of today's hearing. It is supremely ironic that today's hearing, and DOMA itself, share a title regarding the defense of marriage, because they in fact attack marriage. The Defense of Marriage Act in reality attacks the marriages of loving gay and lesbian couples and their families and disrespects the laws of those states that have extended the freedom to marry. If the subcommittee truly wanted to defend marriage, it would urge Congress to repeal this discriminatory law and ensure that lawfully married couples, gay and straight, are respected by the federal government.

The World Has Changed Since 1996

When Congress passed DOMA in 1996, no gay or lesbian couple could lawfully marry. In fact, more than a third of states still criminalized the consensual sexual relationships of gays and lesbians, and their ability to do so had been upheld by the U.S. Supreme Court in *Bowers v. Hardwick*. Those laws were used to justify all manner of unequal treatment for our community – if it was constitutionally permissible to criminalize gays and lesbians, then how could that same constitution demand equal protection in other areas, including marriage? In court after court, *Bowers* ensured that laws which clearly discriminated against gays and lesbians were reviewed in the most deferential manner possible to the government that enacted them. Former Representative Henry Hyde, a strong proponent of DOMA, encapsulated the attitude of that time during the committee consideration of the law: "[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . feel ought to be illegitimate. . . . And in so doing it trivializes the legitimate status of marriage and demeans it by putting a stamp of approval . . . on a union that many people . . . think is immoral."

But there has been a sea change in how the laws, and the American people, view the LGBT community and our families. Even when DOMA was being considered by Congress, the U.S. Supreme Court had just overturned a Colorado constitutional

amendment prohibiting civil rights protections for gays and lesbians, deciding in *Romer v. Evans* that animus against our community alone could not justify the denial of the equal protection of the laws. In 2003, the Court struck another blow at longstanding government-sponsored discrimination against gays and lesbians, ruling in *Lawrence v. Texas* that those laws criminalizing our relationships, upheld in *Bowers*, were in fact unconstitutional and that *Bowers* itself was wrong on the day it was decided. *Lawrence* removed the stain of criminality from our community and undermined the years of discriminatory decisions by courts and policymakers justified by the idea that if we could be criminals, we could not be entitled to other protections under the law. As Justice Kennedy wrote for the majority in *Lawrence*: "Times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."

In making a deliberative and courageous decision to no longer defend DOMA's Section 3, the Justice Department recognized this changed legal landscape and concluded that the laws clear intent—to disadvantage gay and lesbian couples—was not a justification that could withstand judicial scrutiny. Continuing to argue to the contrary would have meant taking untenable positions, like that that gays and lesbians have not faced a history of discrimination or that one's sexual orientation is somehow relevant to a person's ability to contribute to society. The Attorney General took the relatively uncommon, but far from unprecedented, step of ending his defense of a law and giving Congress the opportunity to take it up—a a process Congress itself set up for such rare circumstances.

DOMA's Harms Are No Longer Abstract

Only one year after the historic *Lawrence* decision, Massachusetts became the first state to extend the freedom to marry to loving, committed couples regardless of sexual orientation. Today, gay and lesbian couples can marry in four additional states – Connecticut, Iowa, New Hampshire and Vermont, as well as the District of Columbia, and their marriages are also recognized in Maryland, New York and Rhode Island. In 2008, thousands of gay and lesbian couples married in California before the adoption of a constitutional amendment stripping them of that right, and those marriages remain valid under California law. A number of other states have also extended all or some of the rights and benefits of marriage under state law to gay and lesbian couples through civil unions, domestic partnerships and other forms of relationship recognition. According to a recent report from UCLA's Williams Institute, there are now between 50,000 and 80,000 lawfully married same-sex couples in the United States. In short, we are no longer in a world where the harms caused by DOMA were only abstract. Today, tens of thousands of loving, committed gay and lesbian couples, as well as the children being raised in those households, are denied critical protections by the federal government.

As detailed by the Government Accountability Office (GAO) in reports in 1997 and 2004, there are more than 1,100 instances in which federal law conditions a right, benefit or responsibility is conditioned on marital status. These include a host of social safety net benefits designed to protect American families when they are most in need – in difficult

economic times, in retirement and when loved ones die. In other words, DOMA is visiting real harms on American families, often when they are most vulnerable.

Consider the implications. A couple pays into Social Security, but they are denied the family benefits afforded everyone else. Without the right to sponsor a spouse for immigration, some couples are forced to choose between love and country. The Family Medical Leave Act does not protect same-sex couples in times of sickness. The lesbian and gay soldiers who serve our country in uniform are rewarded with unequal support as their spouses are excluded from military family benefits. A couple loses their home because they have to spend down assets when one spouse must use Medicaid to cover the costs of nursing care.

Congress Can Truly Defend Marriage

If the House leadership truly wishes to defend marriage, there is legislation pending in this chamber which would ensure that all married couples have access to critical benefits and protections. The Respect for Marriage Act (RMA) would repeal DOMA and restore the rights of all lawfully married couples, including same-sex couples, to receive the benefits of marriage under federal law. The bill does not require states that have not yet enacted legal protections for same-sex couples to recognize a marriage. Nor does it obligate any person, state, locality or religious organization to celebrate or license a marriage between two persons of the same sex. This legislation only requires the federal government to equally apply its policy of looking to the states in determining what legal relationships are eligible for federal benefits.

Currently, the Respect for Marriage Act (H.R. 1116 and S. 506)—introduced introduced by Representative Jerry Nadler (D-NY), the ranking member of the Subcommittee—enjoys enjoys the support of more than 100 members of the House and 20 Senators. According to recent Greenberg Quinlan Rosner Research poll, commissioned by HRC, more than half of the American people support repeal of the Defense of Marriage Act and oppose Congress's focus on defending DOMA rather than on creating jobs and strengthening the economy. I urge all the members of the Subcommittee to take a concrete step to defend all marriage and support this legislation.

The Honorable Trent Franks (R-AZ)
Chairman, Subcommittee on the Constitution
Committee on Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jerold Nadler (D-NY)
Ranking Member, Subcommittee on the Constitution
Committee on Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
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May 10, 2011

Dear Chairman Franks and Ranking Member Nadler:

On behalf of Gay & Lesbian Advocates & Defenders (GLAD), a non-partisan legal organization based in Boston, we write to offer comments on the statements offered in the subcommittee's hearing titled "Defending Marriage." GLAD has litigated the exclusion of same-sex couples from marriage in the state courts of Massachusetts, Connecticut, and Vermont, and advocated in the legislatures of other New England states to allow qualified same-sex couples to receive government-issued marriage licenses. GLAD is also currently litigating on equal protection grounds the constitutionality of Section 3 of the Defense of Marriage Act. These cases are *Gill v. OPM,* currently on appeal in the First Circuit Court of Appeals, and *Pedersen v. OPM*, filed in the District Court of Connecticut. *Pedersen* is one of the cases which prompted the Obama administration to announce that it believes DOMA is unconstitutional and that the Department of Justice will cease defending the law in court.[1]

We are submitting the following for inclusion in the record.

1. Maggie Gallagher testified at the hearing that the purpose of marriage "has always been 'responsible procreation', rooted in the need to protect children by uniting them with the women and men who made them"[2] and that her view is "not merely

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[1] *Gill v. OPM,* 699 F.Supp.2d 374 (D. Mass. 2010), *appeal filed,* No. 10-2207. GLAD's co-counsel in *Gill* are Jenner & Block (D.C.), Foley Hoag (Boston) and Sullivan & Worcester (Boston). *Pedersen v. OPM*, Conn. District Court, No. 3:10-cv-01750-VLB. GLAD's co-counsel in *Pedersen* are Jenner & Block (D.C.), Horton, Shields & Knox (Hartford) and Sullivan & Worcester (Boston).

[2] Gallagher Written Submission, p. 1.

> [her] personal and private view, it is the overwhelming consensus of human history and U.S. law."[3]

We have four principal observations about this statement. First, the statement exemplifies the legal shell game constructed by DOMA's defenders who incorrectly frame the relevant issue as who should have access to marriage rather than the justification for Congress's denial of federal recognition to only one class of valid marriages as effectuated by DOMA Section 3. The federal government does not issue marriage licenses – states do. Regardless of the family law and state marriage law preferences of any Member of Congress, the legal fact is that the plaintiffs in the *Gill* and *Pedersen* cases, and couples like them in other states, are *already married* by their home states.[4]

The equal protection question about DOMA Section 3 has nothing to do with the validity of state marriage licensing laws or about whether gay people should be able to marry. Instead, the DOMA Section 3 issue is whether the federal government can pick and choose among married people and disrespect only one class of valid marriages. The massive federal disrespect effectuated by Section 3 of DOMA has profound effects on Americans married to a spouse of the same sex. To that end, GLAD submits the affidavits of the *Gill* plaintiffs setting forth how they have been harmed by their government's non-recognition of their marital status.[5]

Second, given that all persons, including married persons, come to their government on an equal footing, the procreation argument fails to explain why the marriages of same-sex couples alone are singled out for federal disrespect. Many married persons do not have children or cannot have children. Others do not have children in the way Ms. Gallagher prefers, or have children through the same means as do same-sex couples (e.g., through prior relationships, through adoption, through reproductive technology). None of these other marriages are singled out for federal disrespect across the board in every federal statute and program. This rationale is nothing more than the selective application of an invented procreation rule to married couples for the purpose of disadvantaging only married couples of the same sex.

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[3] Gallagher Written Submission, p. 2.

[4] For the record, we submit an article providing an overview of DOMA, its effect on married couples, and the litigation pending in Massachusetts. *See* Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, FAMILY ADVOCATE, Vol. 32, No. 3, pp. 10-17 (Winter 2010).

[5] These affidavits were submitted in conjunction with the Plaintiffs' Motion for Summary Judgment in the *Gill* case, D. Mass. No. 1:09-cv-10309 JLT. These include: Joint Affidavit of Melba Abreu and Beatrice Hernandez; Joint Affidavit of Mary and Dorene Bowe-Shulman; Affidavit of Herbert Burtis; Joint Affidavit of Plaintiffs Nancy Gill and Marcelle Letourneau; Joint Affidavit of Bette Jo Green and Jo Ann Whitehead; Affidavit of Dean T. Hara; Joint Affidavit of Marlin Nabors and Jonathan Knight; Joint Affidavit of Martin Koski and James Fitzgerald; Joint Affidavit of Mary Ritchie and Kathleen Bush; Affidavit of Randell Lewis-Kendell.

Third, on the merits, to the extent Ms. Gallagher implies DOMA Section 3 has any role in "protect[ing] children," she is mistaken. We submit for the record the Declaration of Dr. Michael Lamb from the *Gill* case to provide the expert consensus that what makes good parenting and produces healthy children is good parenting. Dr. Lamb was a top research scientist on child welfare for the U.S. government for many years, working as the head of the Section on Social and Emotional Development, and a Senior Research Psychologist at the United States' National Institute of Child Health and Human Development, an institute within the National Institutes of Health (NIH) in the administrations of Presidents Ronald Reagan, George H.W. Bush, William J. Clinton and George W. Bush.[6] Dr. Lamb's affidavit addresses the full corpus of studies about what produces good outcomes for children and concludes:

> [I]t is beyond scientific dispute that the factors that account for the adjustment of children and adolescents are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of economic and socio-emotional resources. These factors affect adjustment in both traditional and nontraditional families. The parents' sex or sexual orientation does not affect the capacity to be good parents or their children's healthy development. There is also no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or well-being.[7]

Dr. Lamb has also examined the studies and literature on non-traditional families (that is, anything other than a mother at home and father in the workplace)[8] as well as the studies on gay and lesbian parenting. He concludes:

> Children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by heterosexual parents, including 'biological' parents. Numerous studies of youths raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that children and adolescents raised by same-sex parents are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents, including 'biological' parents. Furthermore, the

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6 Dr. Lamb held this position from 1987 until 2004.

7 Lamb Affidavit, para. 12.

8 Dr. Lamb is the author of some of this literature. He has authored more than 500 publications that have appeared either in peer-reviewed professional journals or in professional books published by academic presses primarily for the readership of other professionals. He has written or edited about 40 books in the field of developmental psychology, development in infancy, mother-child relationships, father-child relationships, the role of the father, sibling relationships, the effects of nontraditional rearing circumstances, the effects of daycare, child abuse, and forensic interview practices. *See* Lamb Affidavit, para. 6.

research makes clear that the same factors, as elaborated below, affect the adjustment of youths, whatever the sexual orientation of their parents.[9]

Even if there was a time when the Congress had questions about the outcomes for children raised by parents of the same sex, that is no longer a reasonable question. There is a robust scientific consensus on this point as exemplified by Dr. Lamb and the many professional child welfare organizations stating the same views.[10]

Finally, Ms. Gallagher's references to the purposes of marriage as reflected through U.S. history and law cannot stand. The ruling of the United States Supreme Court in *Griswold v. Connecticut* could not be more explicit in separating the marital couple from any attempt by the State to impose a procreative purpose on the marriage.[11] More recent cases continue to demonstrate that marriage is important and protected apart from any possibility of procreation. *See, e.g. Turner v. Safley*. 482 U.S. 78 (1987) (recognizing numerous purposes of marriage and striking state ban on marriage for prison inmates). In addition, we submit the Expert Declaration of Professor Nancy Cott and her Rebuttal Declaration from the recent California marriage litigation to demonstrate that the state has had many reasons for institutionalizing and licensing marriages, and that their relative salience has changed over time.[12]

In sum, the "procreation" rationale offered by Ms. Gallagher is directed at the question of who should be entitled to lawful marriage rather than to any justification for Congress's wholesale disrespect of a class of valid marriages. Given the Congress's demonstrated concern with supporting child welfare, this concern points in the direction of repealing DOMA and ensuring that all children with married parents can enjoy the material protections the federal government confers on married families.

2. Maggie Gallagher testified at the hearing that those persons who oppose marriage for same-sex couples will be marginalized over time and subject to lawsuits for their beliefs. In her words, "[i]f we – and the law – accept the core ideas driving same-sex marriage, we will also have to accept the consequences for traditional

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[9] Lamb Affidavit, para. 11.

[10] These organizations include the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children. *See* Lamb Affidavit, para. 30.

[11] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (defending marriage as a unique and meaningful relationship against the State of Connecticut's attempt to promote procreation by banning the use of contraceptives).

[12] Dr. Cott is the author of PUBLIC VOWS: A History of Marriage and the Nation (Harvard Univ. Press 2000). The submissions are her Expert Report and her Rebuttal Expert Report in *Perry v. Schwarzenegger*, N.D. Cal., No. 3:09-cv-02292 VRW.

> faith communities, for those Americans who continue to believe that marriage is the union of husband and wife."[13]

The most extraordinary thing about this assertion is that it totally changes the topic. Rather than explain why the federal government should single out a class of valid *marriages* for disrespect in every federal law and program (effectuated by DOMA Section 3), Ms. Gallagher points to persons who refuse to abide by state *non-discrimination* laws or private ethical codes inclusive of sexual orientation for religious reasons (which have nothing to do with DOMA Section 3).

There is nothing shocking about the fact that equality and liberty principles sometimes conflict. This tension was acknowledged from the founding of our country, where Alexander Hamilton stated at the Constitutional Convention in 1787 that "[i]nequality will exist as long as liberty exists… [i]t unavoidably results from that very liberty itself."[14] It has arisen in disputes about private property, income taxation, sexual harassment, school desegregation, free speech and free press among many other issues.

Beyond the ahistorical context of Ms. Gallagher's written comments, her specific assertions are both inaccurate and lacking in any relationship to DOMA Section 3 and the Congress's denial of federal recognition to a class of valid marriages.

For example, without foundation or citation, Ms. Gallagher claims "physicians [are] told they must choose between their values and their profession." The case to which she presumably referred involved a physician who would not provide reproductive health services to a lesbian woman. A copy of the California Supreme Court opinion is attached for the record.[15] The doctors contended that their religious beliefs prohibited them from assisting an unmarried woman to become pregnant, but under California law, the medical practice was a place of public accommodation that could not provide different treatment because of a client's sexual orientation. The California Supreme Court ruled, consistent with a United States Supreme Court decision authored by Justice Antonin Scalia, that no one is relieved from the obligation to obey a law of general applicability on the grounds that it interferes with their religious beliefs. This case is not related to any dispute over marriage, and is governed by the settled law regarding when free exercise concerns may or may not trump a state's general public accommodations anti-discrimination laws.

Ms. Gallagher is also flatly wrong that marriage for same-sex couples has somehow put "Christian adoption agencies … out of business by the government." As she states in her written testimony, "It's a felony to run an adoption agency without a license in Massachusetts. When Catholic Charities asked the government for a narrow exemption

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[13] Gallagher Written Submission, p 4.

[14] Alexander Hamilton, Remarks at the Constitutional Convention (June 2, 1787), PAPER, IV 217 (1787).

[15] Gallagher Written Submission, p. 4; *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court,* 44 Cal. 4th 1145, 708 81 Cal. Rptr. 3d 708, 189 P.3d 959 (2008) ("*Benitez*").

so that they could continue to help needy children without violating Catholic teachings, the government said, 'No, we would not do this if you refused to place couples [sic] with interracial couples, so we won't help you quote unquote discriminate against same-sex couples either.'"[16]

This is a fictitious account, complete with fictitious quotes, of what actually occurred in Massachusetts. It is long past time to correct the record so that this claim can be seen as the diversion it is; nothing about the Catholic Charities matter has anything to do with marriage of same-sex couples, let alone with Congress's discrimination against married same-sex couples through DOMA Section 3.[17]

- Catholic Charities was long involved in finding adoptive homes for children in state care in Massachusetts. At the time the controversy arose, the agency was a state licensee, a state funding grantee, and a place of public accommodation.[18] In each of these capacities, state law forbade discrimination based on sexual orientation.[19]

- In October 2005, the Boston Globe published a story to the effect that Catholic Charities in Boston had placed 13 children with same-sex couples over the last two decades out of 720 total placements.[20] (Massachusetts began licensing marriages of qualified same-sex couples in May 2004). These 13 children were all hard to place foster children who were older or had special needs.[21]

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16 Gallagher Written Submission, p. 4.

17 Maggie Gallagher, *Banned in Boston: Catholic Charities Gets Out of Adoption Business*, THE WEEKLY STANDARD, May 15, 2006, available at http://www.cbsnews.com/stories/2006/05/08/opinion/main1599045.shtml.

18 See Steve Weatherbe, *Boston Catholic Charities Defends Homosexual Adoptions*, NATIONAL CATHOLIC REGISTER, Nov. 13, 2005, available at http://www.ncregister.com/site/article/boston_catholic_charities_defends_homosexual_adoptions/.

19 *See, e.g.*, 102 CMR 5.03 (conditioning licensure on compliance with laws of Massachusetts); M.G.L.A. c. 29 § 29F (debarring potential contractors convicted of discrimination); M.G.L.A. c. 272 § 98 (prohibiting discrimination in places of public accommodation).

20 Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays*, BOSTON GLOBE, Oct. 22, 2005, available at http://www.boston.com/news/local/articles/2005/10/22/archdiocesan_agency_aids_in_adoptions_by_gays/.

21 Boston Herald Editorial Staff, *Gay adoption issue puts heat on gov*, BOSTON HERALD, March 2, 2006, available via subscription at http://www.bostonherald.com/.

- The four Bishops of the Boston Archdiocese then began a study of the placements and Church doctrine.[22]

- In December 2005, the Board of Directors of Catholic Charities unanimously voted to continue to allow placements with same-sex couples.[23]

- In February 2006, the Bishops announced they could not continue providing adoption services without violating Church dogma.[24]

- In response to this announcement, seven of the Catholic Charities Board's 42 directors resigned.[25]

- Then-Governor Mitt Romney proposed a bill to exempt religious organizations from the state's anti-discrimination requirements when providing adoption or foster care services with respect to same-sex couples only.[26]

- On March 10, 2006, Catholic Charities announced it would cease doing adoption work. Its caseload and staff were transitioned to other agencies.[27]

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[22] Patricia Wen, *Church reviews role in gay adoptions*, BOSTON GLOBE, Nov. 4, 2005, at B2, available at http://www.boston.com/news/local/massachusetts/articles/2005/11/04/church_reviews_role_in_gay_adoptions/.

[23] Patricia Wen & Frank Phillips, *Bishops to Oppose Adoption by Gays: Exemption Bid Seen From Anti-bias Laws*, BOSTON GLOBE, Feb. 16, 2006, available at http://www.boston.com/news/local/massachusetts/articles/2006/02/16/bishops_to_oppose_adoption_by_gays/.

[24] *Id.*

[25] Patricia Wen, *Seven quit charity over policy of Bishops*, BOSTON GLOBE, Mar. 2, 2006, available at http://www.boston.com/news/local/massachusetts/articles/2006/03/02/seven_quit_charity_over_policy_of_bishops/. *See also* Peter Meade, *Conscience wins out for this Catholic*, BOSTON HERALD, March 2, 2006, available via subscription at http://www.bostonherald.com. Mr. Meade, the former President of the Catholic Charities Board, explained, "The heart of the matter is this: At Catholic Charities we seek to place some of the neediest children in society in loving adoptive homes, and I cannot be aprt of compromising that mission in the name of discrimination. All couples seeing to adopt through Catholic Charities – regardless of sexual orientation – go through a lengthy and rigorous screening process. There has not been a single instance that I am aware of involving any harm to any child we have placed with gay or lesbian couples. And yet, the bishops' discrimination policy will render this vigorous process meaningless, and instead judge parental fitness solely on the basis of sexual preference." *Id.*

[26] H.R. No. 04776, 2005-06 Leg., 184th Sess. (Mass. 2006) available at http://www.mass.gov/legis/184history/h04776.htm.

- The late-filed bill was referred to the House Judiciary Committee on March 22, 2006, and was not acted upon, thereby defeating the bill.[28]

This account should demonstrate that the Catholic Charities controversy in Massachusetts arose from an internal conflict between Church leaders and the board of Catholic Charities, and not from a threat by the Commonwealth of Massachusetts. The episode has nothing to do with marriage, let alone justifying the federal government's discrimination against a subset of married couples.

3. Ms. Gallagher testified that "[t]he federal government has a right to define marriage for federal purposes, whether the issue is same-sex marriage or polygamy" and that it has frequently defined marriage for purposes of federal laws[29] and to ensure that "polygamy did not become the norm in the U.S." (Written Statement, p. 5). DOMA, she testified, "protects monogamy as well: only one man and one woman are a marriage under federal law."[30] Finally, she testified that "[e]liminating DOMA will make it easier for gay marriage advocates to win the Prop 8 case now working its way through the 9th Circuit to the Supreme Court."[31]

These assertions do no more to prop up DOMA than the other claims already addressed. First, the plaintiffs in *Gill* and *Pedersen* are not questioning whether the Congress may define terms for its own programs, but whether the Congress has complied with equal protection guarantees in doing so. So far, no one has advanced an argument that justifies Congress's blanket non-recognition of the existing, legal marriages of same-sex couples.

Second, to say that federal law has defined the terms "marriage" and "family" proves nothing. It certainly does not even attempt to explain why the Congress, through DOMA, renders the marriages of same-sex couples into non-marriages for all federal purposes. DOMA marks the first time in our nation's history that the *status* of marriage as determined by a state has been disrespected by the federal government across the board. (Regulation of polygamous marriages was directed to territories, over which the federal government has plenary power.)

Despite the often dramatically different family law policies the States have pursued over time, federal reliance on State determinations of marital status is a

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[27] Patricia Wen, *Catholic Charities stuns state, ends adoptions*, BOSTON GLOBE, March 11, 2006, available at http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/.

[28] *Id.*

[29] Gallagher Written Submission, p. 4.

[30] Gallagher Written Submission, p. 5.

[31] Gallagher Written Submission, p. 5.

longstanding tradition – implemented in federal common law, countless federal statutes, and federal regulations. This includes programs directly at issue in the pending DOMA litigation, including: federal income taxation, *see, e.g.*, *Dunn v. Comm'r of Internal Revenue*, 70 T.C. 361, 366 (1978) (referencing number of decisions "recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile")[32]; federal employee benefits, *see* 5 C.F.R. § 843.102 (defining "spouse" by reference to State law); and Social Security survivor and death benefits, *see* 42 U.S.C. § 416(h)(1)(A)(i) ("[a]n applicant is the wife, husband, widow or widower" of an insured person "if the courts of the State" of the deceased's domicile "would find such an applicant and such insured individual were validly married"). Indeed, even in the absence of such express incorporation, the well-established rule has been that federal law affords recognition to familial status determinations as governed by the law of the relevant State. As the Supreme Court recognized in *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956), "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *Id.*

This is not to say that the federal government must tie rights or benefits to marriage alone; many federal programs condition eligibility for particular rights on other criteria in addition to marriage, such as the length of the marriage or the economic eligibility of the participants. Critically, however, the point of such supplemental criteria is not to call into question or redefine who is or is not married – as DOMA does - but merely to implement particular federal interests in the context of specific laws or programs.[33]

Third, there is no basis for injecting the pending challenge to Proposition 8 in California into the discussion of DOMA. The challenges to DOMA involve the actions of the United States Congress in denying federal rights and protections otherwise available to married persons to lawfully married gay and lesbian Americans. The Proposition 8 case[34], on the other hand, does not involve the question of distinctions between types of married persons, but the question of the state's denial of access to marriage in the first instance.

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[32] *See also Lee v. Comm'r of Internal Revenue*, 64 T.C. 552, 556 (1975) ("existence and dissolution [of marriage] is defined by State rather than Federal law"), *aff'd*, 550 F.2d 1201 (9th Cir. 1977); *Von Tersch v. Comm'r of Internal Revenue*, 47 T.C. 415 (1975) (same for joint filing).

[33] Congress has contemplated regulating the marital relationship in the past, but when it has done so, it has not been by legislation but by proposing constitutional amendments – tacitly acknowledging that regulating marriage is beyond the scope of its legislative powers. *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 Wash. U. L.Q. 611 (2004).

[34] *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *on appeal*, No. 10-16696.

Thank you for this opportunity to present materials to the Committee for the record.

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DOMA Damages Same-Sex Families and Their Children

BY MARY L. BONAUTO

AS JUSTICE GINSBURG FAMOUSLY NOTED IN 1996, THE HISTORY OF our constitution is the history of extending constitutional protections to those who were once ignored or excluded from American society. *United States v. Virginia*, 518 U.S. 515 (1996). That journey to citizenship is well under way for gay, lesbian, bisexual, and transgender Americans as well. The first efforts to secure legal respect for committed relationships, inspired by the U.S. Supreme Court's crucial 1967 decision in *Loving v. Virginia*, 388 U.S. 1 (1967), striking down state "anti-miscegenation" laws, were summarily dismissed, a mark of gay people's outsider status at that time. See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

Over the years, however, the larger community has come to understand that gay people are part of the fabric of American life, a perception confirmed by a historical review of polling information. See Karlyn Bowman & Adam Foster, *Attitudes About Homosexuality & Gay Marriage*, American Enterprise Institute for Public Policy Research (June 3, 2008), available at http://www.aei.org/docLib/20080603-Homosexuality.pdf. In addition to issues such as hate crime laws, nondiscrimination in employment, housing and public accommodations, and parenting issues, same-sex couples also are seeking to take on the legal obligations and commitments of marriage. Inaugurated by the Hawaii marriage litigation in the early 1990s, state courts and legislatures have been examining anew the question of what legal rights and protections should be extended to committed same-sex couples.

Currently, same-sex couples have dramatically different legal protections depending on their state of residence. Twelve states and Washington, D.C., have some sort of comprehensive statewide recognition of the relationships of same-sex couples. Beginning with Massachusetts in 2004, five states now allow same-sex couples to marry: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. Maine's and California's marriage laws were reversed in voter referenda. New York, New Jersey, and the District of Columbia are moving forward with attempts to allow same-sex couples to join in marriage.

Another six jurisdictions–California, the District of Columbia, New Jersey, Nevada, Oregon, and Washington–provide comprehensive protections for same-sex couples through some alternative status, such as a civil union, comprehensive domestic partnership, or reciprocal beneficiary. See, e.g., Relationship Recognition Map, Gay & Lesbian Advocates & Defenders, http://www.glad.org/uploads/images/news/relationship-recognition.png (see also page 12).

In addition, one state, New York, and the District of Columbia recognize same-sex marriages performed under the laws of other jurisdictions, although neither presently issues marriage licenses to same-sex couples. See D.C. Code § 46-405.01; *Martinez v. County of Monroe*, 50 A.D.3d 189 (N.Y. App. Div. 2008). Still other states–Colorado, Hawaii, Maryland, and Wisconsin–offer piecemeal protections. Rhode Island offers some authority for recognizing mar-

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riages from other jurisdictions, as do some Native American tribes, some of which also permit marriages between two people of the same sex.

While the numbers continue to grow, at least 35,000 same-sex couples have married in the United States. Same-Sex Couples in the 2008 American Community Survey, the Williams Institute (Sept. 2009), at 2, available at http://www.law.ucla.edu/WilliamsInstitute/pdf/ACS2008_WEB-POST_FINAL.pdf.

A highly unusual federal law

In 1996, eight years before same-sex couples began marrying anywhere in the United States, Congress passed, and President Clinton signed, the Defense of Marriage Act (DOMA). Pub. L. No. 104-199, 110 Stat. 2419 (1996). The law was enacted as state courts in Hawaii were considering whether the state had sufficient justification for excluding same-sex couples from joining in marriage under the Hawaii State Constitution. *Baehr v. Lewin*, 852 P.2d 44, 59-67 (Haw. 1993), on remand *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

The DOMA is an extraordinary law that does two things. First, it invites states to disrespect the expected marriages of same-sex couples—a subject previously governed by state comity law—and purports to allow states to refuse to recognize valid marriages of same-sex couples. Secondly, it excludes married couples of the same sex from all federal laws and programs in which marital status is a factor for eligibility, even though the federal government has long deferred to a state's determination that a couple is married.

Congress stated two purposes in enacting DOMA: "defend[ing] the institution of traditional heterosexual marriage," and "protect[ing] the right of States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any constitutional implications...." H.R. Rep. No. 104-199 (1996), reprinted at 1996 U.S.C.C.A.N. at 2905, 2906.

To those ends, the official House Report on DOMA states that Congress intended to advance four governmental interests in passing the legislation: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic governance; and (4) preserving scarce government resources." H.R. Rep. No. 104-664, reprinted at 1996 U.S.C.C.A.N. at 2916–2922.

The congressional floor debates on DOMA did not show our elected representatives at their best. The remarks of former Congressman Henry Hyde, then-chairman of the House Judiciary Committee, are as blunt as they are typical: "Most people do not approve of homosexual conduct,...and

they express their disapprobation through the law.... It is...the only way possible to express this disapprobation." 142 Cong. Rec. H7501 (daily ed. July 12, 1996).

Throughout the floor debate, members of Congress repeatedly described their own disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion" and "an attack upon God's principles." 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *id.* at H7494 (statement of Rep. Smith). Even the official House Report declared that DOMA was meant to reflect Congress's "moral disapproval of homosexuality." 1996 U.S.C.C.A.N. at 2920. The unusual nature of the legislation, along with the open dis-

play of animosity toward gay people, strongly suggests that Congress was enacting DOMA "because of" and not merely "in spite of" its adverse effects upon a particular group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, n. 24 (1979).

DOMA section 2

To accomplish these various ends, section 2 of DOMA, denominated "Powers Reserved to the States," adds section 1738C to title 28 of the United States Code as follows:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

Legislating under the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, Congress authorized states to prescribe the legal effect of marriage certificates issued in one state in other states so that "no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same-sex." 1996 U.S.C.C.A.N. at 2906.

This is an extraordinary provision, even setting aside the debate about whether section 2 is proper legislation under art. IV, sec. 1. See, e.g., 1996 U.S.C.C.A.N. at 2929–2934 (majority report); 2940–2946 (dissenting report). For starters, Congress could not have been clearer in singling out, and in inviting states to single out, the relationships of same-sex couples for different treatment. Bob Barr, the author of DOMA, now supports the law's repeal, acknowledging recently in an opinion piece that "DOMA was indeed designed to thwart the then-nascent move in a few state courts and legislatures to afford partial or full recognition to same-sex couples." Bob Barr, "No Defending the Defense of Marriage Act," *Los Angeles Times*, January 5, 2009, available at http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009jan05,0,1855836.story.

States accepted the federal invitation to thwart recognition, including Hawaii, which amended its constitution in 1998. As of this writing, 36 states have statutes (adopted legislatively or by referendum) limiting marriage and/or denying protections to same-sex couples, and 29 states have enacted such constitutional amendments. State Anti-Gay Constitutional Amendments & Laws, Freedom to Marry (June 5, 2009), http://www.freedomtomarry.org/maps/anti-marriage_amendments-laws.pdf.

State comity and marriage recognition law

Section 2 of DOMA also is surprising in light of the fact that states have long possessed the power to decide which marriages they would respect from elsewhere, a power that both proponents and opponents of DOMA agree existed before and after DOMA. Patrick J. Borchers, "*Baker v. General Motors*: Implications for Interjurisdictional Recognition of Non-Traditional Marriages," 32 *Creighton L. Rev.* 147, 180 (1998) (favoring the law); Mark Strasser, "Some Observations About DOMA, Marriages, Civil Unions and Domestic Partnerships," 30 *Cap. U. L. Rev.* 363, 370–371 (2002) (opposing the law).

As the House report noted, most states have long observed the rule of *lex loci celebrationis*, that is, the common law rule of recognizing all marriages as valid where celebrated. 1996 U.S.C.C.A.N. at 2912 (majority report); 2941 (dissenting opinions). Out-of-state marriages have essentially not been recognized only where they are deemed "odious" as violative of the "laws of nature" or where the state legislature has acted in derogation of the common law to positively address the validity of certain marriages. See, e.g., *id.* at 2942 (dissenting opinions); Restatement (Second) of Conflicts of Law § 283(2) (1971). As a practical matter, states did not need congressional authorization to enact public policies relating to marriage.

This federal invitation to establish a blanket rule of nonrecognition for marriages of same-sex couples is singular in American history. As the historical record shows, even states at one time hostile to interracial marriage sometimes recognized such a marriage for particular purposes. For example, in *Miller v. Lucks*, 36 So. 2d 140 (Miss. 1948), a marriage was validated at least for the purpose of allowing the surviving spouse to inherit property. While no state authorizes marriages of multiple spouses, courts have allowed the distribution of an estate between two surviving wives of a polygamous marriage. *In re Dalip Singh Bir's Estate*, 83 Cal. App. 2d 256, 188 P.2d 499 (1948). In addition, there is wide support for the proposition that a court can consider whether a marriage is valid for a particular purpose, or incident, of marriage—something seemingly foreclosed by the blanket nonrecognition rules adopted in many states. See Russell J. Weintraub, *Commentary on the Conflict of Laws*, § 5.1C, pp. 312–13 (5th ed. 2006); Herma Hill Kay, "Same-Sex Divorce in the Conflict of Laws," 15 *Kingi Coll. L.J.* 63, 71 (2004).

Full faith and credit

While Congress justified DOMA section 2, based on fears of constitutional compulsion under the Full Faith and Credit Clause of the Constitution of the United States, art. IV, § 1 (as well as the Full Faith and Credit Act, 28 U.S.C. § 1738), no state has yet been required to recognize the validity of a marriage celebrated in another jurisdiction, whether of a same-sex or different-sex couple. The Supreme Court's interpretation of both the clause and the act require a state to afford the "exacting" obligations of full faith and credit only to a final judgment from a judicial proceeding issued by a court of competent jurisdiction. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). The Full Faith and Credit Clause "does not compel 'a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 488–89 (2003).

Apart from the clause's command to enforce judgments, the Full Faith and Credit Clause requires states to have sufficient contacts and state interests when applying its law, rather than the law of another state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). This has been applied in divorce actions to mean that a divorce court must have personal jurisdiction over at least one party to grant the divorce, and over both parties to provide support or equitably divide property. Cf. *Sosna v. Iowa*, 419 U.S. 393, 407–408 (1975); *Williams v. State of North Carolina*, 325 U.S. 226, 229 (1945).

Legal challenges to section 2 of DOMA have been few, and none have succeeded, at least in part because it is the state's nonrecognition law that presents the impediment to recognition, not section 2 itself. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); see also, *Bishop et al. v. United States of America*, No. 04-CV-TCK-TLW (N. Dist. Okla. filed Aug. 10, 2009) (challenging on federal constitutional grounds both the denial of marriage to same-sex couples and the state's refusal to recognize marriages valid where solemnized).

Practitioners in each state must consult their own laws to determine what protections are available to same-sex couples. Some states provide protections notwithstanding state antimarriage laws, such as Oregon's and Washington's domestic partner laws. In other states, the existence of a state law or amendment has been held to preclude the most modest protections for same-sex couples. In Nebraska, a bill that would have given same-sex couples the right to make burial arrangements for their partners was never submitted for a full vote by the legislature when the attorney general opined that the bill was in conflict with the state constitutional amendment. The amendment was upheld in a subsequent constitutional equal protection challenge. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

Codified at 1 U.S.C. § 7, DOMA, section 3 places a "federal" definition of "marriage" and "spouse" in title 1 of the United States Code. At that time, there were only six other "Rules of Construction"–defining "[w]ords denoting number, gender, and so forth": "county"; "vessel"; "vehicle"; "company"; and "products of American Fisheries." 1 U.S.C., ch. 1. Section 3 of DOMA, denominated "Definition of 'marriage' and 'spouse,'" provides as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

DOMA's intent

DOMA's clear purpose was to ensure that if states began licensing marriages of same-sex couples in the future, those married same-sex couples would be denied the full protections, benefits, and responsibilities of marriage. As the controlling House report explained, "to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits." 1996 U.S.C.C.A.N. at 2914. The House report acknowledged the federalist imperatives constraining its powers—"[t]he determination of who may marry in the United States is uniquely a function of state law." 1996 U.S.C.C.A.N. at 2907—but enacted DOMA because it was not "supportive of (or even indifferent to) the notion of same-sex 'marriage.'" *Id.* at 2916.

DOMA section 3's amendment of federal laws

Reports issued after DOMA's enactment reveal 1,138 federal laws in which marital status is a factor. U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), available at http://www.gao.gov/new.items/d04353r.pdf (updating U.S. Gen. Accounting Office, GAO/OGC-97-16 Defense of Marriage Act (1997), available at http://www.gao.gov/archive/1997/og97016.pdf).

DOMA imposes a variety of consequences on same-sex couples that are married. The federal programs to which same-sex married couples are denied represent some of the critical legal safety nets that couples count on when they marry, as they plan their lives and futures together, as they raise children and deal with difficult times, and for which they contribute their American tax dollars. These include:

- Social Security spousal protections that ground a family's economic security in old age and upon disability and death;
- Protections for one spouse's essential monetary resources and ability to stay in the family home when a spouse needs Medicaid for nursing home care;
- Inclusion in a family health insurance policy, and, if receiving that family coverage, to be free of income tax on its value;
- Use of "Married Filing Jointly" status for federal income tax purposes to save the family money;
- Family medical leave from a job to care for a seriously ill spouse;
- Disability, dependency, or death benefits for spouses of veterans and public safety officers;
- Employment benefits for federal employees, including access to family health insurance benefits, as well as retirement and death benefits for surviving spouses;
- Estate/death protections that allow a spouse to bequeath assets to a spouse—including the family home —without incurring any taxes; and
- The ability of a citizen to obtain a visa for a noncitizen spouse and sponsor that spouse for purposes of citizenship.

Of course, with marital protections also come responsibilities. Financially, some two-earner same-sex married couples would pay more in taxes if their marriages were respected. In means-tested programs, such as Medicaid's long-term care for nursing home coverage, the government could account for both spouses' resources, incomes, and assets in determining when a person is qualified for government payments for care. Even eligibility for federal student financial aid requires an assessment of a married student's and his/her spouse's incomes because the married couple is rightly consolidated as a legal economic unit.

For these types of reasons, DOMA section 3 reduces revenues available to the United States Government. A Congressional Budget Office (CBO) report in 2004 opined that recognition of marriages of same-sex couples by all fifty states and the federal government would increase revenue by $1 billion a year. Letter and report from Douglas Holtz-Eakin, director, Congressional Budget Office, to Steve Chabot, chairman, Subcommittee on the Constitution, Committee on the Judiciary (June 21, 2004) available at http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

Equal protection and federalism issues

Given that Congress has made "marriage" the gateway for particular benefits or obligations under federal law, DOMA section 3 provides a "gay exception" to those rules, providing that state-licensed marriages of same-sex couples are not "marriages" for purposes of federal law. This is a historic first. Never before has Congress decided to override a state's determination that a class of marriages is valid or rendered a class of valid marriages a nullity for all federal purposes.

By defining "marriage" and "spouse" for purposes of all federal laws and programs, DOMA, 1 U.S.C. § 7, regulates domestic relations. Yet, both Tenth Amendment jurisprudence and federalist history demonstrate that "domestic relations" are "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *In re Burrus*, 136 U.S. 586, 593–94 (1890)(same). It is difficult to conceive of any area of the law closer to the core powers of the States, and further from the enumerated powers of the federal government, than the "core" family law jurisdiction to define and regulate family relationships and status. See *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id.* at 716 (Blackmun, J., concurring).

Legal challenges to DOMA section 3

Since same-sex marriage has been available in the United States only since 2004, only a few legal challenges have been filed to section 3. None has yet succeeded. In two cases, lower federal courts upheld DOMA, holding that government interests related to procreation and childrearing supported the federal definition of marriage. *Wilson v. Ake*, 354 F. Supp.2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004). A California couple has twice challenged DOMA and lost, in the first case on standing grounds since they were not married, *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006), and, in the second case, for suing the wrong defendant, *Smelt v. United States of America*, No. SACV 09-00286, slip op. (C.D. Cal. Aug. 24, 2009).

On the other hand, Judge Reinhardt of the Ninth Circuit Court of Appeals, considering a claim of sexual orientation discrimination under internal employment dispute resolution rules in that court, and acting in his capacity as designee of the chair of the Ninth Circuit's Standing Committee on

Federal Public Defenders, suggested that DOMA should be subject to heightened scrutiny, and found that its denial of federal benefits to the same-sex spouse of a federal employee had "no rational basis" and therefore "contravene[d] the Fifth Amendment." *In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. Jud. Council 2009) (Reinhardt, J.).

A case pending in the Massachusetts Federal District Court, *Gill et al. v. Office of Pers. Mgmt.*, No. 1:09-cv-10309, Amended Complaint (D. Mass. July 31, 2009), squarely addresses the equal protection issue of DOMA's disparate treatment of identically situated married persons. For more information, see http://www.glad.org/doma. The plaintiffs—seven couples and three surviving spouses—are all married persons who have applied for and been denied particular protections only because of DOMA section 3. The equal protection theory of the case is that Massachusetts has only one class of marriages, but by operation of DOMA section 3, that one class is divided into two classes, with same-sex married couples being denied all federal protections, while other married persons receive federal protections, without sufficient justification.

Several of the plaintiffs seek spousal protections based on their employment with, or their spouse's employment with, the United States Government. Plaintiff Nancy Gill, a 22-plus year employee of the United States Postal Service, already receives "Self and Family" health insurance coverage for herself and the couple's two children through her job. Yet, she is unable to add her spouse to that plan or to the vision plan, as other married postal workers routinely do. Instead, the family must pay for another health plan for her spouse, spending money that could be used to meet household needs or saved for the children's college.

Never before has Congress decided to override a state's determination that a class of marriages is valid or rendered a class of valid marriages a nullity for all federal purposes

Martin Koski, a retiree from the Social Security Administration, has been denied health insurance coverage for his spouse of 33 years, even though other retired employees add their spouses to such coverage. Although Martin's spouse has health coverage through his employment, such coverage costs more and provides less than Martin's plan. The couple also worries that Martin's spouse may be unable to continue working because of severe asthma, and that there will be a dramatic loss of household income when Martin dies because his spouse will have no access to the "survivor annuity."

Dean Hara is the surviving spouse of Gerry Studds, now deceased, a federal employee for 27 years who served for 24 of those years as a member of Congress. Hara has been denied both health insurance and the survivor annuity (pension) normally available to surviving spouses.

Different tax treatment

Several of the plaintiffs in the *Gill* case have been denied spousal protections available under the Internal Revenue Code and, thus, pay more in federal income taxes than other similarly situated married couples in Massachusetts. In filing their federal income-tax returns, each of these plaintiffs seeks to file as "married filing jointly," rather than as "single" or "head of household." Among these plaintiffs are Mary Ritchie, a Massachusetts State Police sergeant, and her spouse, Kathleen Bush, who cares for their children and is deeply involved in the community. In addition to paying almost $15,000 extra in federal income taxes in the last four years, Mary has been unable to establish a "spousal IRA" for Kathleen, her "non-working" spouse, as other working married people routinely do to provide for the well being of their spouses.

Another plaintiff, Mary Bowe, seeks relief from payment of federal income taxes on the value of health insurance her employer (the Commonwealth of Massachusetts) provides for her spouse, Dorene Shulman, a cancer survivor and parent to their two children. Mary has paid as much as $1,200 a year in federal income taxes on the value of that insurance and believes she, like all other spouses, should not be required to pay income tax on such employer-provided health benefits. Each plaintiff filed an amended return with the IRS asking to be recategorized as a married taxpayer and requesting a refund. Each amended tax return and accompanying request for a refund was rejected by the Internal Revenue Service based on DOMA section 3.

Several of the plaintiffs seek spousal protections afforded by the Social Security Administration. Three widowers, together with their partners for as many as 60 years, and already distressed by the death of their spouses, seek the lump-sum death benefit normally available upon the death of a spouse to help pay funeral costs. One of the widowers, a musician and music teacher, Herbert Burtis, also seeks Social Security survivor benefits that would allow him to

substitute his deceased spouse's higher benefit for his own, as is standard for spouses, and resulting in an additional $700 a month. Jo Ann Whitehead, another retiree, seeks to increase her monthly Social Security payment to the standard one-half of her higher-earning spouse's payment.

Recent activity in *Gill*

The United States Department of Justice recently moved to dismiss the *Gill* case, but not on any of the grounds originally asserted in the House Report on DOMA. Significantly, the United States has expressly disavowed the purported interests in "responsible procreation and child-rearing" as set forth in the House report, 1996 U.S.C.C.A.N. at 2916–17. As the United States observed in its memorandum:

> Since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have issued policies opposing restrictions on lesbian and gay parenting upon concluding, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.... Furthermore, in *Lawrence v. Texas*, 539 U.S. 558, 605 (2003), Justice Scalia acknowledged in his dissent that encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples under the reasoning of the *Lawrence* majority opinion—which, of course, is the prevailing law—because "the sterile and the elderly are allowed to marry." Thus, the government does not believe that DOMA can be justified by interests in "responsible procreation" or "child-rearing."

Gill, No. 1:09-cv-10309, U.S. Memo. in Support of Motion to Dismiss at 19, n.10.

The United States now relies on a notion of "adjust[ing] national policy incrementally" and "preserving consistency" to defend section 3 and its denial of marital protections only to married persons of the same sex:

> Given the evolving nature of this issue, Congress was constitutionally entitled to maintain the status quo pending further evolution in the states. Otherwise, "marriage" and "spouse" for the purposes of federal law would depend on the outcome of this debate in each State, with the meanings of those terms under federal law potentially changing with any change in the status of the debate in a given State. Federal rights would vary dramatically from State to State. Congress could reasonably have concluded that there is a legitimate government interest in maintaining the status quo and preserving nationwide consistency in the distribution of marriage-based federal benefits.

Id. at 18.

> Given the federal government's consistent deference to a state's determination that a couple is married, it is obvious that it is the United States that has changed the status quo by denying recognition of a class of valid marriages. Certainly, this defense still fails to explain why only married same-sex couples have been denied the marital protections ordinarily available to married couples. *Commonwealth of Massachusetts v. United States Dep't of Health and Human Servs., et al.*

The Commonwealth of Massachusetts also filed its own case challenging DOMA on two different theories. *Commonwealth of Massachusetts v. United States Dep't of Health and Human Servs., et al.*, No. 1:09-cv-11156, Complaint (D. Mass July 8, 2009), available at **http://www.mass.gov/Cago/docs/press/2009_07_08_doma_complaint.pdf**. First, relying on the Tenth Amendment and federalism principles, it seeks to invalidate section 3 as an unprecedented intrusion by the federal government: "the Commonwealth's sovereign authority to define and regulate marriage" and "regulate the marital status of its citizens." *Id.* at 1.

Efforts are underway in Congress to repeal DOMA, no doubt bolstered by President Obama's position that "the Administration does not support DOMA"

Second, the complaint contends that DOMA violates the spending clause in that it "imposes conditions on the Commonwealth's participation in certain federally funded programs that require the Commonwealth to disregard marriages" of same-sex couples. *Id.* at 2–3. The suit points both to increased costs borne by the Commonwealth because of DOMA as well as correspondence with federal agencies warning of financial consequences and recoupment of federal monies spent if Massachusetts treats married same-sex couples as married in programs with federal financial participation. The United States has moved to dismiss this case on standing grounds and failure to state a claim. *Commonwealth of Mass. v. United States Dep't of Health and Human Servs., et al.*, No. 1:09-cv-11156, United States Motion to Dismiss (D. Mass. Oct. 30, 2009).

Current legislation before Congress

In addition to litigation, efforts are underway in Congress to repeal DOMA in whole or in part, no doubt bolstered by President Obama's position that "the Administration does not support DOMA as a matter of policy, believes that it is

discriminatory, and supports its repeal." See *Gill*, No. 1:09-cv-10309, Memorandum of United States in Support of Motion to Dismiss at 1. On September 15, 2009, Rep. Gerald Nadler and 90 additional original cosponsors introduced the "Respect for Marriage Act," H.R. 3567, 111th Cong. (1st Sess. 2009) to repeal DOMA in its entirety.

The bill does not obligate any state to license marriages of same-sex couples, but it does return the issue of recognition to its status prior to DOMA. The bill also would provide federal protections and responsibilities not only to persons who are married in their state of residence, but also to those who marry in a state and then return home or move or travel to another state where their marriage may not be recognized. The same "certainty" protections apply to foreign marriages, as long as the marriage is one that could be performed in any state of the United States.

Also of note are bills that would effectively repeal DOMA section 3 for particular purposes. The "Domestic Partner Benefits and Obligations Act of 2009" would extend all benefits available to employees of the federal government, such as health and life insurance and retirement and disability benefits, to a federal employee's "domestic partner." Domestic partners certify that they are a committed couple living in the same household and sharing responsibilities. S. 1102, 111th Cong. (1st Sess. 2009); H.R. 2517, 111th Cong. (1st Sess. 2009). The "Family and Medical Leave Inclusion Act" would amend that law to entitle, among others, a "same-sex spouse, [or] domestic partner" to family medical leave. H.R. 2132, 111th Cong. (1st Sess. 2009).

Conclusion

DOMA departs from federalist traditions of leaving states to determine whether a person is married. DOMA section 2 invites and legitimizes discrimination against same-sex couples, and section 3 deprives tax-paying American families of the federally created economic safety nets for married people. These laws not only create and sanction a system of first- and second-class marriages–even as same-sex couples take on the commitment and duties of their legal marriage vows—but also deny a range of protections to these couples and their children. **FA**

Mary L. Bonauto has been the Civil Rights Project Director at Gay & Lesbian Advocates & Defenders (GLAD), working in the six New England states, since 1990. She has litigated widely in state and federal courts and agencies of the six New England states since 1990 on issues of employment discrimination, parental rights, free speech and marriage. She has litigated marriage cases in Vermont (1999), Massachusetts (2003), Connecticut (2008), and is currently counsel in a constitutional challenge to the "federal definition" portion of the federal Defense of Marriage Act.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
MARTIN KOSKI & JAMES FITZGERALD,)
DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
MARLIN NABORS & JONATHAN KNIGHT,)
MARY BOWE-SHULMAN &)
DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
)
Plaintiffs,)
)
v.)
)
OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

JOINT AFFIDAVIT OF MELBA ABREU AND BEATRICE HERNANDEZ

Melba Abreu and Beatrice Hernandez, being duly sworn, hereby depose and say as follows:

1. Melba and Beatrice: We have been a committed couple since 1987 and married in Massachusetts in May 2004, after 17 years together. This month of November we celebrate our 22nd anniversary and have been married legally for over 5 years.

2. Melba and Beatrice: We moved to Massachusetts from Florida in 1992. We lived in Brighton, Massachusetts for 17 years, and recently moved nearby when we purchased a condominium in July 2009.

3. Melba: I am 54 years old and have an educational background in accounting and architecture. Since 2007, I have worked as the chief financial officer for a rapidly growing non-profit organization located in Boston that works on educational and workforce advocacy and reform. I previously worked for many years at Harvard University as a financial professional.

4. Beatrice: I am 48 years old and have an educational background in design, technology, and architecture. I am in the process of founding my own web design practice. The company is presently in its initial stages and generates no income. I am also pursuing my passion for writing and am currently in the process of working on a

book of poetry in English and a collection of short stories in Spanish. Before transitioning into these ventures, I worked for a number of years at Harvard University as an administrator. I left the university in order to independently pursue career development and to maintain our household given that Melba faces so many demands with her work. Due to the recent purchase of our home and the added financial responsibilities of home ownership, I am now actively seeking a return to the workplace and am placing on hold the continuing development of my practice.

5. Beatrice: My parents left Cuba to come to America shortly before I was born. In so doing, they left everything behind – the accomplishments of their work and that of the generations before them. They sacrificed to ensure a future of opportunity and prosperity for their children. For me, the American dream is the dream of all Americans to have a level playing field, a government of laws and an economic system in which people can count on enjoying the fruits of their labor without government interference. Like any other American, I want to provide for my family and our future.

6. Melba: I left Cuba at age 26 in a search of both freedom and prosperity. For me, it is responsible to work hard, and important to know that the rewards of that work will protect my family. I work to ensure the well-being of our present and future years, with a goal that we may never need to depend on anyone, not even our government. This is of great importance to Beatrice and I.

7. Melba and Beatrice: Our experience of the federal Defense of Marriage Act ("DOMA") is that the government denies the validity of our civil marriage and in so doing, disrespects the reality of our marital status, altering our security in the process.

We recognize the importance of having our federal government treat all those who marry equally. We live with the results of that non-recognition and denial.

8. Melba and Beatrice: DOMA prevents us from correctly stating our civil status as married, effectively forcing us to misrepresent our civil status at the federal level. It is incorrect to say that we are not married on official government forms given our legal marriage to one another. This feels perilous for us as responsible and law-abiding Americans, and we find it impossible to reconcile this contradiction. Melba: As a CFO, I am particularly aware of the need to be accurate in one's statements, especially in the forms filed with the federal government.

9. Melba and Beatrice: Since marrying in 2004, we have filed our state income tax returns with the Commonwealth of Massachusetts as Married Filing Jointly. We are forbidden by DOMA from doing so for our federal income tax returns. Melba: What this means is that I file and pay federal income tax returns as though I am "single" rather than acknowledging my married household. Beatrice: Beginning in 2004, I have had no income and have not been required to file any federal income tax return.

10. Melba: For each tax year since our marriage, that is 2004-2008, I prepared and paid our federal income taxes as DOMA requires.

11. Melba and Beatrice: For the tax years 2004-2008, we have also submitted to the IRS an amended federal income tax return on IRS Form 1040X, with requests for refunds representing the difference between what Melba paid as a single filer and what we would have paid as joint filers.

12. Melba and Beatrice: With each amended federal income tax return and refund claim, we attached a Form 8275, Disclosure Statement and 8275-R, Regulation

Disclosure Statement in order to explain the changes to the originally filed federal income tax return. For 2004, we provided the following:

Attachment To Form 1040X, Part II, Explanation of Changes
Form 8275, Disclosure Statement
Form 8275-R, Regulation Disclosure Statement
2004 Tax Year

REFUND CLAIM BASED ON THE UNCONSTITUTIONALITY OF THE "DEFENSE OF MARRIAGE ACT"

The taxpayer, Melba Abreu, ID #[###-##-####], a spouse in a same-sex couple, was married under the laws of the Commonwealth of Massachusetts as of December 31, 2004. For the tax year of this amended return, the taxpayer filed a joint Massachusetts income tax return with her spouse as a married couple. However, in accordance with the federal law known as the Defense of Marriage Act ("DOMA"), the taxpayer filed an individual, federal income tax return as though she was unmarried. The taxpayer believes that being required to file as though she is unmarried amounts to unequal treatment compared to other married persons in Massachusetts. The taxpayer believes that her marriage, which is valid under Massachusetts law, should be respected for federal tax purposes, just like the Massachusetts marriages of heterosexual couples. Although this position is contrary to DOMA, the taxpayer believes that DOMA is unconstitutional and that she should be allowed to file this amended joint return with her spouse and receive the refund shown herein.

In particular, if the taxpayer were able to file as married filing jointly, such a filing status would affect the following adjustments:

The federal tax as decreased from $16,306 to $11,619. .
The taxpayer previously paid $16,306 in federal income tax in her original return for this taxable year. As a result of these adjustments, the amount of overpayment is $4,687.

13. Melba and Beatrice: With each successive amended federal income tax return and refund claim filed, we included the same Explanation of Changes and Disclosure Statement Attachment described above, except that the tax year, amount of federal income tax paid, and amount of refund claimed were adjusted to reflect the proper tax year.

14. Melba and Beatrice: However, for each tax year, the IRS disallowed our refund claims. For our 2004 refund claim, under the heading "Why We Cannot Allow Your Claim," the IRS stated that: "Same sex marriages are not recognized at the Federal level." The other denials were similar. We expect the same disallowance of our pending 2008 refund claim.

15. Melba and Beatrice: Because DOMA requires Melba to file our federal income tax returns as single rather than allowing us to file as married filing jointly, we have paid more in federal income taxes than other married couples like us. The extra income taxes paid are as follows:

- tax year 2004: $4,687 more in federal income tax;
- tax year 2005: $3,785 more in federal income tax;
- tax year 2006: $5,546 more in federal income tax; and
- tax year 2007: $5,697 more in federal income tax,

for a total of $ 19,715 in just four tax years. Assuming our 2008 refund claim is denied in the amount of $5,644, the total in additional tax payments will be $25,359.

16. Melba and Beatrice: As American citizens seeking equitable treatment, we would pay more in taxes if our incomes required it, so long as we are paying based on a filing status that is consistent with our civil status as married persons.

17. Melba and Beatrice: Because of DOMA, any time federal law intersects with our lives and marriage, we are put at a disadvantage and routine matters become complicated. In connection with our recent condominium purchase, we will be unable to benefit from the federal government's first-time home buyer credit of $8,000, despite the facts that we are first time home buyers and our purchase has helped to stimulate the

economy. In addition to our real estate attorney, we had to incur the cost and seek the counsel of an estate planning lawyer. We had to think ahead to how our financial circumstances might change over the rest of our lives, and to the certainty of death, and then factor in how with DOMA, we would not be able to pass our estates to one another without tax complications as federally respected spouses may do. All of this affected the question of how we should take title to the property now, knowing nothing about the future other than that our marriage is not respected by federal tax laws.

18. Melba and Beatrice: Our experience is that there is so much misinformation and confusion about marriages of same-gender couples. DOMA erases our marriage at the federal level and that can complicate even ordinary transactions. Our federal government sets the tone, and since it does not respect our marriage, it signals to others that they do not have to either.

Signed under the pains and penalties of perjury on this 10th day of November, 2009.

/s/ Melba Abreu
Melba Abreu

/s/ Beatrice Hernandez
Beatrice Hernandez

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
MARTIN KOSKI & JAMES FITZGERALD,)
DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
MARLIN NABORS & JONATHAN KNIGHT,)
MARY BOWE-SHULMAN &)
DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
)
Plaintiffs,)
)
v.)
)
OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

JOINT AFFIDAVIT OF MARY AND DORENE BOWE-SHULMAN

Mary Bowe-Shulman ("Mary") and Dorene Bowe-Shulman ("Dorene"), being duly sworn, hereby depose and say as follows:

1. Mary and Dorene: We have been a committed couple for 13 years, since 1996. We were legally married at our home in Somerville, Massachusetts on May 23, 2004, with our two daughters by our side. We married as soon as we were able, within the first week that marriage became available to us in Massachusetts. It was very meaningful for us, and for our families, that we were able to legally wed.

2. Mary and Dorene: On August 9, 1997, before we were able to legally marry, we held a commitment ceremony that was attended by family and friends. It was very special to us and it signified our lifelong bond.

3. Mary and Dorene: We have two daughters. Emma is 10 years old and Olivia is 7 years old. Our daughters attend the Acton public schools, where we currently live. They are active in town soccer, softball, dance, community theater, Brownies and Hebrew School.

4. Mary and Dorene: We first lived together in a two-family home in Somerville, and Mary's mother lived with us there for part of the year, too.

5. Mary and Dorene: In 2005, we bought a single family home in Acton. Our Acton home includes an in-law apartment that we had renovated so that Mary's

mother could live with us there, too. Mary's mother lives with us for approximately 3-4 months per year, and spends the remaining months in Florida.

6. Mary: I am an attorney employed by the Commonwealth of Massachusetts. I work for the Appeals Court as a Staff Attorney. I have worked there for 16 years.

7. Dorene: I am self-employed as a licensed acupuncturist. I also teach acupuncture courses. Prior to becoming an acupuncturist, I worked as a database manager for several non-profit organizations in the Boston area. While our children are young, Mary and I have decided that I should work part-time so I can be at home with them.

8. Dorene: Before we were legally married, getting health insurance coverage for me was a struggle and a source of stress. I am a two-time cancer survivor, and my mother died young of cancer. For years, we had to cobble together health insurance coverage because I could not be covered by Mary's employer-based plan despite the fact that Mary was already paying for a family plan that covered our children. There were times when I was not sure if I would continue to have adequate coverage and that caused us worry.

9. Mary: Immediately after our legal marriage, I added Dorene to our family health insurance plan provided by my employer, the Commonwealth of Massachusetts. Our two daughters had already been on my family health insurance plan, but Dorene was not eligible until after our marriage.

10. Mary: Several months after I added Dorene to my family plan, I received a paycheck that was approximately $1,000 less than my regular paycheck. I was very

alarmed and called my Human Resources representative. During that call, I learned that I was obliged to pay federal income taxes on the value of Dorene's health insurance coverage because of DOMA.

11. Mary: The first decreased paycheck I received represented the cumulative effect of several months of this federal taxation. Subsequently, additional imputed income was added to each of my bi-weekly paychecks, forcing me to pay higher federal income taxes. The amount of added income varies each payroll year, and currently it is $262.28 per bi-weekly pay period.

12. Mary and Dorene: DOMA has increased the amount of federal income tax that we pay. We file our state income tax return with the Commonwealth of Massachusetts as Married Filing Jointly, but, under DOMA we are required to file separate federal income tax returns as though we are unmarried.

13. Mary: Each year since our marriage in 2004, I have filed my federal income tax returns using the "Head of Household" filing status, even though I am legally married. Also, each year since our marriage the value of Dorene's health insurance has been added to my federally taxable income, resulting in higher federal income taxes paid by me than I would pay if our marriage was recognized. Employer-sponsored health insurance for spouses is not normally taxed.

14. Dorene: Each year since our marriage in 2004, I have filed my federal income tax return using the "Single" filing status. This makes me uncomfortable, because I know that I am married and that I have two children with Mary. It makes me feel like we are a fractured family because we cannot all be represented on one federal income tax return.

15. Mary and Dorene: In 2006, we paid $3,332 more in federal income tax than we would have paid had we been permitted to file as Married Filing Jointly. Also, if we would have been permitted to file as Married Filing Jointly, Mary would not have had to pay federal income tax on imputed income attributable solely to the value of Dorene's spousal health insurance.

16. Mary and Dorene: After paying our 2006 federal income taxes in full, we submitted an amended federal income tax return for 2006 on IRS Form 1040X, changing our filing status from Mary filing as Head of Household and Dorene filing as Single, to the two of us filing together as Married Filing Jointly. In our 2006 amended federal income tax return, we also excluded the imputed income attributable to the value of Dorene's spousal health insurance, since employer-sponsored health care benefits provided to an employee's spouse are not taxable under the Internal Revenue Code.

17. Mary and Dorene: Our 2006 amended federal income tax return included a claim for refund in the amount of $3,332.

18. Mary and Dorene: With our 2006 IRS Form 1040X amended federal income tax return and refund claim, we attached the Form 8275, Disclosure Statement and 8275-R, Regulation Disclosure Statement to explain our changes to our originally filed federal income tax returns.

19. Mary and Dorene: The Explanation of Changes, Form 8275 Disclosure Statement and Form 8275-R, Regulation Disclosure Statement states:

Attachment To Form 1040X, Part II, Explanation of Changes
Form 8275, Disclosure Statement
Form 8275-R, Regulation Disclosure Statement
2006 Tax Year

REFUND CLAIM BASED ON UNCONSTITUTIONALITY OF THE "DEFENSE OF MARRIAGE ACT"

The taxpayer, Mary Bowe, ID #[###-##-####], a spouse in a same-sex couple, was married under the laws of the Commonwealth of Massachusetts as of December 31, 2004. For the tax year of this amended return, the taxpayer filed a joint Massachusetts income tax return with her spouse as a married couple. However, in accordance with the federal law known as the Defense of Marriage Act ("DOMA"), the taxpayer filed an individual, federal income tax return as though she was unmarried. The taxpayer believes that being required to file as though she is unmarried amounts to unequal treatment compared to other married persons in Massachusetts. The taxpayer believes that her marriage, which is valid under Massachusetts law, should be respected for federal tax purposes, just like the Massachusetts marriages of heterosexual couples. Although this position is contrary to DOMA, the taxpayer believes that DOMA is unconstitutional and that she should be allowed to file this amended joint return with her spouse and receive the refund shown herein.

Further, the taxpayer believes that she should not be taxed on the value of employer-based health care benefits provided to her spouse, when such benefits would be excluded from federal income tax if the taxpayer were in a heterosexual marriage. In accordance with DOMA, the taxpayer's federal W-2 issued by her employer included as additional taxable income the value of the employer-based health care benefits provided to her spouse. Because the taxpayer believes that DOMA is unconstitutional and that the value of employer-based benefits provided to her spouse should be excluded from income, just as it would be for heterosexual couples, this amended return reflects such exclusion. For the aforementioned reasons, the adjusted income reported on this amended return is necessarily inconsistent with the federal wages reported on the taxpayer's federal W-2.

If the taxpayer were able to file as married filing jointly and to exclude the value of employer-based health care benefits provided to her spouse, such a filing status would decrease federal tax from $5,860 to $2,542. The taxpayer previously paid $5,860 in federal income tax in her original return for this taxable year.

As a result of these adjustments, the amount of overpayment is $3,332.

20. Mary and Dorene: In early October 2009, we received a letter from the IRS, by certified mail, disallowing our amended return and refund claim for 2006. The IRS letter stated that "We are unable to process your claim for the tax period(s) shown above. As yet, the federal government does not recognize same sex marriages."

21. Mary and Dorene: The money we overpaid in federal income taxes, and that we continue to overpay, would be very helpful to our family budget. It could go into household savings or be saved towards our daughters' educational expenses. Also, Emma and Olivia both enjoy extracurricular activities, and we have had to cut back on some of them recently due to cost.

22. Mary: I am also upset that, because of DOMA, Dorene cannot be on my FSA account. Dorene is the one with the potential for greater medical expenses that might not always be covered by our health insurance. If Dorene could be on my FSA, just as our children are and as other spouses typically are, we would have additional tax savings that could help our family.

23. Mary and Dorene: There is always an extra burden that we face, especially when handling even routine financial issues. Because we have to keep everything artificially separate for tax purposes, we are always extra-cautious about everyday things such as who signs certain checks. Other intact families don't have to be so cautious and worried, either one can pay because everything ultimately ends up on one joint income tax return anyway.

Signed under the pains and penalties of perjury on this 12th day of November, 2009.

/s/ Mary Bowe-Shulman

Mary Bowe-Shulman

/s/ Dorene Bowe-Shulman

Dorene Bowe-Shulman

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309 JLT

NANCY GILL & MARCELLE LETOURNEAU,)
MARTIN KOSKI & JAMES FITZGERALD,)
DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
MARLIN NABORS & JONATHAN KNIGHT,)
MARY BOWE-SHULMAN &)
DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
)
Plaintiffs,)
)
v.)
)
OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)
)

AFFIDAVIT OF DEAN T. HARA

I, Dean T. Hara, hereby depose and say, as follows:

1. My name is Dean T. Hara, and I reside at 505 Tremont Street, Unit 602, Boston, Massachusetts. I am a citizen of the Commonwealth of Massachusetts.

2. In January 1991, I met Congressman Gerry E. Studds (Gerry) in Washington, D.C.; and we began dating. We fell in love; Gerry proposed on Labor Day; I accepted; and we became a committed couple for life from that time in 1991 forward.

3. For the next 5-plus years, until Gerry retired from the United States House of Representatives in January, 1997, I shared in Gerry's Congressional life as his recognized spouse, attending countless public, Congressional and political events.

4. I became a member of the Democratic Spouses organization in 1992 and remained a member until this year – 12 years after Gerry retired from Congress.

5. When Gerry retired, we moved back to Massachusetts, splitting our time between Boston and Provincetown.

6. We registered as domestic partners in Provincetown in 1998 in order to declare our commitment and obtain some legal recognition of our relationship. Gerry's brother and sister-in-law attended the ceremony at Provincetown's Town Hall as our witnesses.

Although a bare minimum, it was the only government-sanctioned action we could use to formalize our relationship. It was the natural thing to do.

7. In 2002, Boston became our sole residence. Gerry had settled into a quiet, largely non-public life with a series of consulting jobs. I worked, and still do, as a financial advisor with a financial services company.

8. Gerry certainly never thought that same-sex couples would be able to marry in his lifetime. However, with the Goodridge decision from the Massachusetts Supreme Judicial Court in November, 2003, the world for us looked very different. And, as the May 17, 2004 effective date of Goodridge drew near and it became evident that marriage equality was going to be a reality, Gerry and I knew that we would marry as soon as legally possible.

9. We had been a committed couple for 13 years; it was time to be able to take our formal vows at last. So, we decided on a private wedding ceremony with our close friends David Simpson and Thomas Green in the living room of their home. We also decide to marry on May 24, 2004, the same date as my parents' wedding.

10. We were married for nearly two and a half years when, on October 3, 2006, Gerry never returned home from walking our dog, Bonnie, having collapsed from a blood clot. He died at the Boston Medical Center on October 14, 2006.

11. The family bonds I established with Gerry's brother, sister and their families have only grown stronger. Our Christmas holiday tradition continues, and I attended the weddings of two of Gerry's nephews in 2009.

12. Gerry was always concerned about me and how I would be provided for should be die before me. He did everything he could to satisfy himself that I was protected, including by preparing an estate plan.

13. At the same time, it always bothered Gerry tremendously that he could not provide his federal pension and his federal health insurance benefits to me as other congressional representatives can do for their spouses. Part of his concern was simply wanting to provide for me but part of it was also his sense that it was fundamentally unfair that our relationship – no different from the relationships of his colleagues – was treated differently and discriminated against.

14. Gerry was in Congress when the Defense of Marriage Act ("DOMA") was debated and passed in 1996, and he spoke passionately and personally about it on the floor of the House as I watched from the gallery. He said, "I have paid every single penny as much as every Member of this House has for that pension, but my partner, should he survive me, is not entitled to one penny. I do not think that is fair, Mr. Speaker." He also said, "The spouse of every Member of this House is entitled to that Member's health insurance, even after that Member dies, if he or she should predecease his or her spouse. That is not true of my partner."

15. In 2005, on the first anniversary of the Goodridge decision, Gerry and I did a television appearance on "Greater Boston with Emily Rooney" where he and I both talked about the fact that Gerry's pension benefits and health insurance were unavailable to me.

16. In that same interview, we also discussed how it felt dishonest to file our federal income tax returns as "single" when we were, in fact, married. But, of course, because of

DOMA, that is what our accountant told us we were required to do. Gerry told the interviewer that it made him uncomfortable because it required him to attest to something that he knew was not true. It's hard to compress into words what it's like to receive letters from the United States government telling me that my marriage and 16 years together with Gerry had no value. The unfairness and inequity that Gerry feared and spoke against ten years earlier during the DOMA debate had become my personal reality.

17. As Gerry's surviving spouse, I took a number of steps to exercise rights available generally under federal law to surviving spouses.

18. I applied for the one-time Social Security lump sum death benefit. The Social Security Administration denied my application, citing DOMA.

19. I also applied for a monthly survivor annuity as the surviving spouse of a former Congressman who had been receiving a federal pension. The Office of Personnel Management (OPM) denied my application, ultimately relying on Gerry's asserted failure to elect survivor benefits for me and on DOMA.

20. That matter was litigated at the Merit Systems Protection Board. The Judge rejected OPM's failure-to-elect defense and entered a finding to the contrary that Gerry effectively elected a survivor annuity for me. I was still denied receipt of the annuity because of DOMA. A true and correct copy of that Initial Decision is attached as Exhibit A.

21. Finally, with the MSPB ruling in place, and knowing that OPM could not rely on any failure of election, I applied to OPM for the federal health insurance benefits available to a surviving spouse. I was denied, and OPM's final decision rested on the proposition that Gerry was covered in a "Self-Only" plan at the time of his death. A true

and correct copy of OPM's final decision, by letter dated June 18, 2009, is attached as Exhibit B.

22. Since I have been denied participation in the federal health insurance program, I purchase my own health insurance in the marketplace. I am an independent contractor and do not have employer provided coverage. Currently, I am paying more than $8,000 per year for my individual health insurance. I calculate that, in the three years since Gerry's death, my inability to participate in the federal employee health insurance program because of DOMA Section 3 has cost me approximately $15,000.

Signed under the pains and penalties of perjury this 10th day of November, 2009.

/s/ Dean T. Hara
Dean T. Hara

Certificate of Service

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/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
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DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
MARLIN NABORS & JONATHAN KNIGHT,)
MARY BOWE-SHULMAN &)
DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
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Plaintiffs,)
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v.)
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OFFICE OF PERSONNEL MANAGEMENT,)
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MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

JOINT AFFIDAVIT OF PLAINTIFFS NANCY GILL AND MARCELLE LETOURNE

Nancy Gill ("Nancy") and Marcelle Letourneau ("Marcelle"), being duly sworn, he depose and say as follows:

1. Nancy and Marcelle: We have been a committed couple for nearly 30 years, since 1980. We legally married as soon as we were able. On May 21, 2004, after 24 years together and with our two children at our side, we were legally married by a justice of the peace in Brockton.

2. Nancy and Marcelle: We live in Bridgewater, Massachusetts, and we have two children. Our daughter is 16 years old and our son is 10 years old. Both of our children attend the local public schools.

3. Nancy: I am a 22-year employee of the United States Postal Service ("Postal Service"). I have worked for the postal service since 1987.

4. Marcelle: I have been employed in administrative capacities by a nursing services provider in Massachusetts for more than 25 years. I also work as an independent medical transcriptionist.

5. Nancy: When the children were younger, I worked the night shift at the Post Office for many years so that I could be available to our children during the day.

6. Nancy and Marcelle: We married to solemnize our longstanding commitment to each other and to our family.

7. Nancy: As an employee of the Postal Service, I am enrolled in the Federal Employees Health Benefits Program ("FEHB"). I have been enrolled in FEHB with a "Self and Family" Plan since the birth of our daughter in January 1993. The plan now covers me and our children. I thought that, once we were married, I would be able to provide this coverage to Marcelle just as I am able to provide it for our children. This would help our family. But Marcelle was unable to be covered because of DOMA.

8. Nancy: Marcelle should have been automatically covered by my Self and Family Plan upon our marriage on May 21, 2004. On the Monday after our wedding, May 24, 2004, I took the additional, permitted step of submitting a standard SF 2809 form to my employer, listing as my family members my children and my spouse. I was very excited about finally getting to add Marcelle to our family health insurance plan.

9. Nancy: On May 25, 2004, I had a conversation with my Human Resources Manager, Ann Mailloux, concerning my rights to benefits coverage for Marcelle.

10. Nancy: By letter dated June 4, 2004, the Postal Service advised me "that the Postal Service is unable to provide you with benefit coverage for your partner [sic]."

11. The June 4, 2004, letter provided the following reasoning:

> The Postal Service is bound by rules and regulations issued by the Office of Personnel Management and applicable federal law (as opposed to state law). Same-sex partners are not considered eligible under Federal Employees Health Benefits (FEHB) or Federal Employees Group Life Insurance (FEGLI) in that federal law defines family members (which are covered) as a spouse and an unmarried dependent child under age 22. Public Law 104-199, Defense of Marriage Act, states, that the word

> 'marriage' means a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

12. Nancy and Marcelle: We were truly shocked that Marcelle was denied benefits under Nancy's plan. We did not anticipate this, we thought our marriage would be treated the same as the marriages of Nancy's co-workers.

13. Nancy: On June 7, 2004, I made a request for pre-complaint counseling under the Equal Employment Opportunity Process and was advised to complete and return PS Form 2564-A within 10 days. I completed PS Form 2564-A within 10 days, writing that I had not been treated equally and had been "discriminated against for being a lesbian." Specifically, I stated: "Anyone who has gotten married while employed by the US Postal Service has the right to put their new spouse on their Health Insurance. That new spouse is entitled by marriage to a host of benefits which my spouse is denied. How can this be called anything but discrimination?" For a resolution to my pre-complaint, I stated: "Allow me to have the same rights as my co-workers who are married."

14. Nancy: By letter dated June 21, 2004, USPS NEEO Dispute Resolution Specialist Debra A. DeSantis wrote to me to "conclude the pre-complaint stage of the EEO Complaints Process." The letter told me that: (1) benefits are administered by the Office of Personnel Management, which relies on Public Law 104-199, i.e., DOMA, 1 U.S.C. § 7, to exclude the marriages of same-sex couples from the requested benefit; and (2) as to "the factors of discrimination as depicted [sic] in the Civil Rights Act, Title VII does not include sexual orientation as a protected class."

15. Nancy: On June 29, 2004, I filed an "EEO Complaint of Discrimination in the Postal Service," seeking "the same rights and benefits and responsibilities as any one of my co-workers who are also married."

16. Nancy: In a decision dated July 20, 2004, my complaint was dismissed for failure to state a claim because discrimination based on sexual orientation "is not actionable under EEOC Regulations."

17. Nancy and Marcelle: We have had to purchase health insurance for Marcelle that would otherwise have cost nothing through the Postal Service, since Nancy already had the "Self and Family" plan. We have had to do this because DOMA does not permit Nancy to cover Marcelle through her family health insurance.

18. Marcelle: Since I cannot be on Nancy's family plan, I purchase my own health insurance coverage through the Visiting Nurses Association. The annual cost of the plan varies, depending on how many hours I work and the prevailing rates, but, since our marriage, the cost of having a separate health plan for me has been over $4,000. Also, I wear corrective lenses and, because I cannot get on Nancy's vision plan, that ends up costing us hundreds of dollars extra each year for my eyeglasses and eye exams.

19. Nancy: Because of the extra expense of health insurance for Marcelle, and the unfairness of that to our family, I again sought to add Marcelle to my FEHB Self and Family Plan, as well as to the vision benefit plan ("FEDVIP") and to my flexible spending account, during the open enrollment period between November 10, 2008 and December 9, 2008.

20. Nancy: Initially, I tried to enroll Marcelle through the PostalEASE system through our home computer, and then through the PostalEASE Employee Kiosk at my

workplace on Friday, November 21, 2008. When I attempted to add Marcelle to my health and vision plans, I received a variety of system error messages that told me that the gender for me and my spouse could not be the same for enrollment purposes.

21. Nancy: I continued to try, by phone and by mail, to obtain assistance from my local Human Resources officer in adding Marcelle to my health and vision benefit plans and flexible spending account.

22. Nancy: I received a letter dated December 8, 2008, from Michelle Palardy, HR Generalist Principal, USPS – SENE District. That letter said that I was not allowed to get any spousal benefits for Marcelle because of DOMA.

23. Nancy: I followed up by writing a letter to the United States Postal Service HR Shared Services Center in Greensboro, North Carolina to confirm that there were no further steps I could take to enroll Marcelle for spousal benefits. By letter dated January 2, 2009, the HR Shared Services Center wrote back to me and stated: "the information provided to you by Michelle Palardy is correct."

24. Nancy: I work just as hard as my colleagues at the Post Office. They are able to get benefits for their spouses and I am not. This is upsetting and painful for me and for my family.

25. Nancy and Marcelle: DOMA causes other problems for our family, in addition to the problem of not being able to join Marcelle to our family health insurance and other benefits plans. For example, preparing our federal income taxes is a huge aggravation and burden. We have to spend many extra hours preparing our filings because of being forced to file differently at the federal and state levels. Rather than file a joint income tax return with both the state and federal government like other married

couples, we have to prepare individual income tax returns for federal purposes and a joint return for the state. To prepare the joint state return we have to prepare a "dummy" joint federal return that we do not file.

26. Nancy: It is a slap in the face to not be able to use our correct legal status, and it is a reminder that the very government I work for, the country our taxes help support, does not even recognize us as a couple.

27. Marcelle: In a very real way, DOMA limits our choices about how we run our family life. It changed our life plan. At the time we married, we were planning for me to be a stay-at-home parent for several years – to give all of us, and especially our children, a break from the juggling of balancing their needs with our two jobs. We had no idea that I wouldn't be covered by Nancy's health plan. I have had to remain in the workforce in order to have access to health insurance.

28. Marcelle and Nancy: We are very upset that it did not work for Marcelle to leave the workforce for a short while. In that way, DOMA has limited our choices and affected our kids.

Signed under the pains and penalties of perjury on this 10th day of November, 2009.

/s/ Nancy Gill

Nancy Gill

/s/ Marcelle Letourneau

Marcelle Letourneau

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/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
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DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
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RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
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Plaintiffs,)
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OFFICE OF PERSONNEL MANAGEMENT,)
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JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
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MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

JOINT AFFIDAVIT OF BETTE JO GREEN AND JO ANN WHITEHEAD

Bette Jo Green ("Bette Jo") and Jo Ann Whitehead ("Jo Ann") being duly sworn, hereby depose and say as follows:

1. Bette Jo and Jo Ann: We have been a committed couple for 28 years, since 981. We have known each other for 49 years, ever since we met in college in 1960.

2. Bette Jo and Jo Ann: After 23 years together as a couple, we were legally ıarried on June 7, 2004. We married in the garden of our Jamaica Plain home with friends nd neighbors in attendance.

3. Bette Jo: I am 67 years old. Last year, I retired from a 35-year career as a .abor and Delivery Nurse at a large Boston-area hospital. I love nursing and had a ulfilling career. However, labor and delivery work is very physically demanding and I eached a point where I needed to slow down and that is when I retired.

4. Jo Ann: I am also 67 years old. I work as Garden Educator with a non-rofit group in the Boston area. I have worked in urban community gardening for more ıan 10 years and previously worked in public school settings.

5. Bette Jo and Jo Ann: We live together in a single family home that we own ı Jamaica Plain. We are deeply involved in our local community. We both volunteer and re active in our Neighborhood Watch. Bette Jo takes elderly neighbors on shopping trips,

nd both of us help at programs for local children and youth, including weekly summer arbecues.

6. Jo Ann: We are both cancer survivors. I survived a difficult fight with bone ancer and, afterwards, had to reduce my working hours because of ongoing fatigue.

7. Bette Jo: I suffered from both uterine and cervical cancer. Several of my emale relatives died from cancer.

8. Bette Jo and Jo Ann: We remain conscious of the risk of recurrence of ancer, and of Bette Jo's family history. Jo Ann just had a scare with a tumor on her left idney that turned out to be benign.

9. Bette Jo and Jo Ann: We have many supportive family members, primarily n the Midwest. We make annual trips to spend time with our families.

10. Jo Ann: In February 2008, when I was 66 years old, I applied for and began eceiving Social Security retirement benefits based on my Social Security earnings record. continue to receive Social Security retirement benefits based on my own earnings record.

11. Bette Jo: In February 2008, at the age of 65 years and 10 months and in nticipation of my retirement from nursing, I applied for and began receiving Social ecurity retirement benefits on my own earnings record.

12. Jo Ann: Bette Jo has had higher lifetime earnings than I have. DOMA locks my ability to receive benefits based on Bette Jo's earnings record. This hurts me nd us in three ways. First, I could receive a larger monthly Social Security benefit amount f I could draw on the spousal benefit rather than relying solely on my own earnings record. ight now, the annual difference from my not receiving the spousal benefit is about $400 er year, an amount that makes a difference to us.

13. Jo Ann: Second and a greater financial harm, if I could receive spousal enefits based on Bette Jo's earnings record, I could delay my retirement age for purposes f Social Security based on my own earnings record, which would increase my benefit mount later. If I could receive spousal benefits now as other spouses can, I would delay ıy own retirement age until 70, which would increase my payment to $1,315, rather than he $1,018 I currently receive. That is $3,600 per year that I will lose beginning at age 70.

14. Bette Jo and Jo Ann: Third, what worries us is that there are much bigger onsequences down the road for Social Security not recognizing our marriage. We have an ngoing concern, especially in light of our health histories, about Jo Ann's lack of access to he Social Security survivor benefit in the event that Bette Jo dies first. It would be very ard for Jo Ann to live on just her benefit, which is less than half of what Bette Jo receives. f this happens, and Jo Ann is denied the survivor benefit, she will lose about $12,864 per ear (at today's rates).

15. Bette Jo and Jo Ann: DOMA makes our retirement finances much more omplicated, and makes us worried about what will happen in the future. As we plan and udget our yearly expenses, there is the concern that if Bette Jo died before Jo Ann, Jo Ann vould have no safety net and would not be able to meet the costs of living, including ıaintaining our home, as well as paying for food and non-insured medical care.

16. Jo Ann: Without the survivor benefit, I would be without the love of my life nd I worry that I would likely never be able to visit my family and friends in the Midwest, s the cost of traveling would become prohibitive on such a small budget.

17. Jo Ann: On March 26, 2008, I went in person to the Boston office of the SSA and applied for the Social Security spousal benefit based on Bette Jo's earnings record, because I want to be treated the same as other spouses.

18. Jo Ann: The SSA denied my claim for spousal benefits in an April 2008 letter. The letter stated that: "Since the Defense of Marriage Act prohibits SSA from finding that your [sic] and the insured were married for benefit purposes, you are not eligible for Spouse's Benefits."

19. Jo Ann: I appealed, and on January 17, 2009, the SSA responded with another denial. I then entered an Expedited Appeals Process ("EAP") agreement with the SSA. The EAP allows me to bring my claim in federal court.

20. Bette Jo and Jo Ann: In addition to these financial harms and concerns, DOMA also affects us in other ways. Even though we are legally married, our own government is denying the validity of our marriage and that forces us to explain ourselves all the time, even sometimes to family members.

21. Bette Jo and Jo Ann: DOMA makes us feel erased, like we don't even exist. Also, we believe it reinforces negative views that others may hold – it promotes discrimination by others.

22. Bette Jo: After our marriage, I was surprised that we didn't get equal tax treatment with respect to our health care coverage. Jo Ann had been on my health insurance plan at the hospital before marriage. After marriage, I still had to pay federal income taxes on imputed income attributable to the value of Jo Ann's coverage. That didn't change with marriage, and it seemed unfair.

Signed under the pains and penalties of perjury on this 15th day of November, 2009.

/s/ Bette Jo Green

Bette Jo Green

/s/ Jo Ann Whitehead

Jo Ann Whitehead

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/s/ Gary D. Buseck
Gary D. Buseck

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ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)
)

AFFIDAVIT OF HERBERT BURTIS

I, Herbert Burtis, being sworn, hereby depose and say as follows:

1. I am 79 years old and a resident of Sandisfield, Massachusetts.

2. I am a musician, and currently teach music to private students and as an adjunct professor at Smith College.

3. I met John Ferris ("John") in 1948 while we both attended Michigan State University. John had interrupted his college career to join the United States Army, and left military service in 1947 and returned to college. We were brought together by our mutual interest in classical music and we both had long careers as musicians.

4. We moved from Michigan to New York City after John was accepted into a graduate program at the School of Sacred Music of Union Theological Seminary. I transferred to Columbia University, where I received my degree, to be closer to John. In New York City, I worked part-time as the associate organist and choirmaster at St. Paul's Chapel, Columbia, while pursuing my own graduate studies at Union Theological's School of Sacred Music. During this time, John worked as the choirmaster and organist at a church in New Jersey.

5. In 1958, John left New York to become Harvard University's Choirmaster and University Organist, a position he held for 32 years. During his time there, he was editor of the Harvard Hymnal, and integrated the previously all-male choir into a mixed

choir of men and women for the first time in Harvard's history. He also taught at the Harvard Divinity School and at Boston University.

6. When John took the job at Harvard, I left my job at Columbia University and assumed John's former position at the church in New Jersey.

7. We maintained our relationship even as we had to commute. In 1961, we purchased our home in Sandisfield, Massachusetts, so that we could be together when we did not have work responsibilities.

8. In 1979, I left my church position in New Jersey and moved to Arlington, Massachusetts so that John and I could begin living together full time once more. During this time, I gave private music lessons to students at Harvard and at studios I maintained in New York City and in New Jersey.

9. In 1990, at age 64, John retired from Harvard University and began to collect Social Security benefits based on his own work record after working his entire adult life. At age 62, I began to collect Social Security benefits based on my own lifetime work record.

10. Even though we were "retired," we were both deeply involved in teaching music and lecturing. John also took over the directorship of a choir at a nearby church in Connecticut. I continued teaching and maintained studios in New York City and New Jersey until 2005.

11. John's health began to deteriorate in 1990. He was diagnosed with Parkinson's disease in 1992. We worked and traveled as much as we could consistent with taking care of John's health needs. As time went on, John was able to do less and less, and I did more and more.

12. We were married by a justice of the peace at our home in Sandisfield, on May 23, 2004. After 55 years together, we believed we were already a family, but with John's failing health, we hoped that marriage would increase our legal protections and that I would be included on John's medical insurance from Harvard. That never happened.

13. John's longstanding struggle with Parkinson's disease intensified considerably in 2005. I had to make "911" calls a number of times, as John developed infections and other conditions requiring repeated hospitalizations up through the time of his death in 2008. I was his principal care-provider at home, tending to his personal and medical needs, arranging for medical treatments and hospitalizations, and dealing with the many emergencies, medication questions, and other issues that arose as John's condition worsened.

14. We both wanted John to be at home as much as possible, so I made the house as safe and comfortable as it could be for someone who had such difficulty standing or walking. I tended to all of his personal needs, helped with medications and monitored his condition at all times. I carried him about the house as much as I could, but eventually injured myself doing so. I created devices to keep him from falling if I had to leave the room. I hired health aids to assist me part of the time, but I was the one responsible for him 24/7 over the last three years of his life.

15. John had a stroke at home on July 3, 2008. He then went back and forth between the hospital emergency room and a nursing home. He died on August 1, 2008 at the Great Barrington Nursing and Rehabilitation Center in Great Barrington, Massachusetts, at age 82.

16. When John died, I had been in a committed relationship with him for 60 years and had been married for more than four. His death has left a hole in me that will never again be filled. It has also taken time for me to regain my health after years of operating what John and I referred to as our "one bed nursing home."

17. As I began to put my financial house in order, I applied to the Social Security Administration ("SSA") for the "One-Time Lump-Sum Death Benefit" of $255 normally available upon the death of a spouse through Social Security. I also applied for the Social Security survivor benefit normally available to a surviving spouse whose own Social Security payment is lower than that of the deceased spouse. The survivor benefit would increase my monthly Social Security payment by approximately $700 per month, to the level of the monthly payment John received before his death.

18. My applications were denied, and by letter dated January 20, 2009, SSA informed me that my request for reconsideration had also been denied. I later entered into Expedited Appeals Process (EAP) agreement with SSA.

19. In my 79 years, I have not talked very much about my sexual orientation, and that's worked out for me. In my 60 years with John, it was not all moonlight and roses, but we stuck by each other through everything as spouses do.

20. I think equality under law is a very important part of the American system. I know many widows who are eligible for the surviving spouse benefit and it makes an enormous difference to them. The widower's benefit would to me, too, helping me pay my Medicare Part B coverage, as well as my asthma and high blood pressure medications. DOMA tells me that my marriage doesn't count, and I think that makes my

marriage lesser and my country a lesser entity. I simply believe I should be treated like the surviving spouses of other married people.

Signed under the pains and penalties of perjury this 6th day of November, 2009.

/s/ Herbert Burtis

Herbert Burtis

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
MARTIN KOSKI & JAMES FITZGERALD,)
DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
MARLIN NABORS & JONATHAN KNIGHT,)
MARY BOWE-SHULMAN &)
DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
)
Plaintiffs,)
)
v.)
)
OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

JOINT AFFIDAVIT OF MARLIN NABORS AND JONATHAN KNIGHT

Jonathan Knight ("Jonathan") and Marlin Nabors ("Marlin") being duly sworn, here depose and say as follows:

1. Marlin and Jonathan: We have been a committed couple for 4 years. We are both from the Midwest and we met in Indiana in 2004. In 2005, we moved together from Indiana to Boston, Massachusetts.

2. Marlin and Jonathan: We moved to Boston so that Marlin could accept a promising job offer in academic administration. We made this decision to relocate together. We knew that it would be a big transition, but we had faith in our commitment to each other and looked forward to our shared future.

3. Marlin and Jonathan: We were legally married at Newton City Hall on October 26, 2006. That evening, we celebrated at our home with approximately 25 people present. We just celebrated our 3rd wedding anniversary.

4. Marlin and Jonathan: We married because we reached a point in our relationship when we knew that we would be together for life, no matter what, and so it made sense to solidify our commitment through marriage. We feel appreciative to be living in a state where marriage is available to us.

5. Marlin: I am a student services administrator at a university in Boston. I have been employed at the same institution since moving to Boston in 2005.

6. Jonathan: After moving to Boston, I registered with a temporary agency and was placed at a local medical school. On February 9, 2009, the medical school hired me for a permanent position dealing with financial operations.

7. Marlin and Jonathan: We purchased a home together in Hyde Park, Massachusetts. This is the first time either of us has been a homeowner.

8. Marlin and Jonathan: Since we bought our home, we have been devoting energy and resources to fixing up and maintaining our new property. Jonathan's father has visited us from Indiana several times in order to assist us with home improvement projects. For example, he helped us to install our new appliances.

9. Marlin and Jonathan: DOMA has increased the amount of federal income taxes we have to pay. Because we cannot file jointly, we lose money each year. In the last three years, we have paid $2,894 more in federal income taxes because DOMA will not allow us to file our federal income taxes as a married couple. We would like to save that money or put it into home improvements in our new home.

10. Marlin and Jonathan: We just want our marriage to be treated like any other, not to be treated differently. Right now we are losing money because of being treated differently, but even if, down the road, we earn higher incomes and would owe more money as a married couple, then we would want to pay that amount. We want to pay our fair share, and to have our marriage recognized.

11. Marlin and Jonathan: Since marrying in 2006, we have filed our state income tax returns with the Commonwealth of Massachusetts as Married Filing Jointly. We each file separate federal income tax returns using the "single" status, because DOMA forbids us from filing as Married Filing Jointly.

12. Marlin and Jonathan: For the tax years since our marriage, that is from 2006-2008, we paid all our federal income taxes owed in full, and later submitted amended federal income tax returns, on IRS Form 1040X, changing our filing status from two individual taxpayers each filing as a Single filer to a married couple filing together as Married Filing Jointly.

13. Marlin and Jonathan: Each of our amended federal income tax returns to the IRS included a claim for refund. We requested refunds as follows:

- In 2006: $1,286
- In 2007: $1,234
- In 2008: $374

14. Marlin and Jonathan: Each time we filed an amended federal income tax return, we attached to the IRS Form 1040X the Form 8275, Disclosure Statement and 8275-R, Regulation Disclosure Statement, in order to explain our changes to our originally filed federal income tax returns.

15. Marlin and Jonathan: For the 2006 tax year, the Attachment states:

Attachment To Form 1040X, Part II, Explanation of Changes
Form 8275, Disclosure Statement
Form 8275-R, Regulation Disclosure Statement
2006 Tax Year

REFUND CLAIM BASED ON UNCONSTITUTIONALITY OF THE "DEFENSE OF MARRIAGE ACT"

The taxpayer, Marlin Nabors [###-##-####], a spouse in a same-sex couple, was married under the laws of the Commonwealth of Massachusetts as of December 31, 2006. For the tax year of this amended return, the taxpayer filed a joint Massachusetts income tax return with his spouse, Jonathan Knight [###-##-####]. However, in accordance with the federal law known as the Defense of Marriage Act ("DOMA"), the taxpayer filed an individual, federal income tax return as though he were unmarried. The taxpayer believes that being required to file as though he were unmarried amounts to unequal treatment compared to other married persons in Massachusetts. The taxpayer

believes that his marriage, which is valid under Massachusetts law, should be respected for federal tax purposes, just like the Massachusetts marriages of heterosexual couples. Although this position is contrary to DOMA, the taxpayer believes that DOMA is unconstitutional and that he should be allowed to file this amended joint return with his spouse and receive the refund shown herein.

In particular, if the taxpayer were able to file as married filing jointly, the federal tax decreases from $7,919 to $6,613.

As a result of this adjustment (as well as the $20 difference in federal telephone excise tax credit for married filing jointly taxpayers), the amount of overpayment is $1,286.

16. Marlin and Jonathan: With each successive amended federal income tax return and refund claim that we filed, we included the same Explanation of Changes and Disclosure Statement Attachment described above, except that the tax year, amount of federal income tax paid and amount of refund claimed were adjusted to reflect the proper tax year.

17. Marlin and Jonathan: We received a notice from the IRS, dated May 18, 2009, stating that the agency was changing our 2007 filing status to Married Filing Jointly, and further noting an "Amount to be refunded to you" of $1,234. Just a few days later, we were surprised to receive a joint refund check for $1,234 from the IRS.

18. Marlin and Jonathan: Because we believe that this 2007 refund check was issued in error and in violation of DOMA, § 3, we set the refund check aside and did not cash it.

19. Marlin and Jonathan: Our lawyer contacted the IRS Customer Service Office by telephone on May 18, 2009 to ask about the refund check. He spoke with two IRS representatives who confirmed that both the 2007 and 2006 amended federal income tax returns and refund claims had been approved, but the representatives reported that

they could not re-open the returns or mark them to be re-examined for error. They suggested to our lawyer that he write a letter.

20. Marlin and Jonathan: Then, on May 20, 2009, our lawyer sent a letter to the IRS on our behalf. He notified the IRS of the 2007 refund check already received and the expected 2006 refund check and stated that "[i]t is our understanding that the Taxpayers' claim for a filing status change and refund should have been denied pursuant to DOMA, and we can arrange for the Taxpayers to return the refund check they have received."

21. Marlin and Jonathan: Then, in a second IRS notice of refund dated May 25, 2009, the IRS issued to us a joint refund check for $1,286 relating to our 2006 amended federal income tax return and refund claim. This time, the letter and the check came together.

22. Marlin and Jonathan: Because we believed that this 2006 refund check was issued in error and in violation of DOMA, § 3, just like the 2007 refund check, we set the check aside and did not cash it.

23. Marlin and Jonathan: In a letter dated October 29, 2009, the IRS reversed its earlier decisions, stating that "[t]he federal government does not recognize same sex marriage and does not allow a filing status of joint for partners of the same sex." The IRS asked us to return the refund checks, which we have done.

24. Marlin and Jonathan: The situation that resulted in us erroneously receiving two refund checks shows why DOMA is confusing. We often have to explain to people that, even though we are married, our marriage is not recognized in some places

including not by the federal government. We are playing by the rules and doing what we are told to do, but it is not really sensible or fair.

25. Marlin and Jonathan: We have not heard anything yet about our 2008 amended federal income tax return and request for refund, because we just filed that amended return recently.

Signed under the pains and penalties of perjury on this 12th day of November, 2009.

/s/ Marlin Nabors

Marlin Nabors

/s/ Jonathan Knight

Jonathan Knight

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
MARTIN KOSKI & JAMES FITZGERALD,)
DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
MARLIN NABORS & JONATHAN KNIGHT,)
MARY BOWE-SHULMAN &)
DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
)
Plaintiffs,)
)
v.)
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OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

JOINT AFFIDAVIT OF MARTIN KOSKI AND JAMES FITZGERALD

Martin Koski and James Fitzgerald, being duly sworn, hereby depose and state as follows:

1. Martin and James ("Jim"): We have been life partners for 34 years, since 1975. We assumed marriage would give us more legal protections and resolve any outstanding questions about our legal status and commitment to one another. We married on September 10, 2007 in a private ceremony in our home.

2. Martin and Jim: We live together in our jointly owned condominium in Bourne, Massachusetts. We plan our finances and futures based on our desire to protect and provide for one another. Jim: I am currently 58 years old. Martin: I am now 67 years old.

3. Martin: I am retired from the Social Security Administration (SSA), where I worked for a total of 21 years. I worked as a claims representative in Boston from 1968 to 1979, and then again from 1995 until 2005. I was 63 when I retired in 2005.

4. Jim: In 1979, we left Boston and moved to Florida. Martin's father came to live with us in 1982. About nine years later, Martin's father was diagnosed with lung

cancer. At that point, I spent much of my time caring for Martin's dad. I felt like he was a father to me and I believe I was like a son to him.

5. Martin: My father passed away in December 1994, with both of us at his side. In 1995, we returned to Boston.

6. Jim: For four years, I have been working as a recovery aide at a treatment center. I work 32 hours per week which is enough hours to qualify for health insurance through my employment. Health insurance is very important to me and Martin because I have severe asthma that must be monitored regularly and controlled with medications. Because my asthma is very serious, I am not certain how much longer I will be able to continue working. I am 58 years old and will not qualify for Medicare coverage until age 65. Being able to have health insurance through Martin's employment would really help me adjust my work hours and cover any gap in health care coverage.

7. Martin: As a former employee and retiree of the Social Security Administration (what they call a "qualified annuitant"), I am enrolled in the Federal Employees Health Benefits (FEHB) program.

8. Martin: Prior to October 5, 2007, I was enrolled in FEHB under a "Self-Only" plan covering only myself. Because I recognize how hard it is for Jim to work, after our marriage, I sought to enroll him in my health plan by changing my enrollment from "Self Only" to "Self and Family." The Office of Personnel Management ("OPM") declined to enroll us in the "Self and Family" plan and cover Jim as a "member of family," that is, as my spouse because of DOMA. I received a final reconsideration decision from OPM by letter dated July 1, 2008.

9. Martin: I believe our marriage should be treated like other marriages of retired federal employees. It disadvantages our family to be denied the same health coverage other federal retirees receive for their spouses. We have paid $5,806 more in premiums, co-pays and prescription costs because Jim is not enrolled in my plan and has to use his inferior work plan. We expect these costs will continue to rise.

10. Martin and Jim: Since our marriage through the end of 2009, we will have paid at least $2,367 more in premiums because Martin cannot enroll in the Self and Family plan. Jim pays for coverage at his workplace and Martin pays for his Self Only Plan. If we had to pay only for a Self and Family Plan, we would have saved:

- $97 per month for 2007. Instead of paying for Jim's policy at a cost of $263 monthly and Martin's self only plan at a cost $125 per month for a total of $388, we could have paid for the Self and Family plan at a monthly cost of $291for a savings of $97 for each of the three months we were married;
- $1,152 ($96 per month) for 2008. Instead of paying for Jim's policy at a cost of $276 and Martin's self only plan at a cost of $135 per month for a total of $411, we could have paid for the Self and Family plan at a monthly cost of $315 per month for a savings of $1,152 for all of 2008; and
- $912 ($76 per month) for 2009. Instead of paying for Jim's policy at a cost of $281 and Martin's self only plan at a cost of $152 per month for a total of $433, we could have paid for the Self and Family plan at a monthly cost of $357 per month for a savings of $912 for all of 2009.

11. Martin: We have also paid more in co-pays, because Jim is not covered on my plan. For example, Jim had a colonoscopy this year where the co-pay under his

plan was $233 and would have been zero under my plan. In addition, Jim's plan does not cover hearing aids, and repairs on his hearing aids cost us $490 this year that would have cost $73, or $417 less under my plan. So far, the additional costs for co-pays is $650.

12. Martin: We have also paid more in prescription costs because Jim is not covered under my plan. For 2007, the extra cost was $226. For 2008, the extra cost was $1,140. In 2009, we have already paid an extra $1,060 in prescription costs and expect to pay an additional $330 by the end of the year, for a total of $1390. All totaled, the extra prescription costs since our marriage are $2,756 and counting.

13. Martin: Apart from health insurance, my other concern is what happens to Jim if I die before he does. No one knows who will die first, but I am nine years older than he is. As things stand, if I die, my federal pension dies with me. This federal pension is a large percentage of our income and pays our mortgage every month. In addition, as things stand, Jim would not be eligible for the survivor benefit from social security. I am very concerned that he would not be able to afford living in our home – all because he will be denied survivor rights available to the surviving spouses of other retired federal employees.

14. Martin: Because of my concerns about what happens if I die first, and since other retired employees can select a survivor annuity benefit on their pensions, I wrote to OPM about doing so for Jim in October 2008. OPM denied my request for survivor annuity because of DOMA. That action has been dismissed without prejudice to my re-filing it by December 2010.

15. Jim and Martin: DOMA causes a lot of confusion for people in managing their affairs. When we bought our condominium, no one could really provide solid

guidance about how to take title because our marriage was not "like other marriages." We also find tax preparation difficult because we file our income taxes as married filing jointly with the Commonwealth of Massachusetts but we then have to artificially disentangle our joint finances in order to file our federal income tax returns as "Single" filers. We do that by preparing a joint federal return that is not filed but used to calculate the state return and then filing separate returns.

16. Martin: I have an IRA with Fidelity but I cannot even list Jim as my spouse on that. I feel like everyone knows that a spouse has rights, and it concerns me that Jim doesn't benefit from that same understanding.

17. Martin and Jim: We believe DOMA conveys disrespect for our marriage to the wider world, and tells people that we are two individuals rather than a couple. This is particularly concerning for us when we leave the state, and we worry that the legal papers we have will not be enough if there is an emergency and someone challenges our right to be by the other's side.

Signed under the pains and penalties of perjury on this 10th day of November, 2009.

/s/ Martin Koski

Martin Koski

/s/ James Fitzgerald

James Fitzgerald

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
MARTIN KOSKI & JAMES FITZGERALD,)
DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
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DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
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Plaintiffs,)
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OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

AFFADAVIT OF RANDELL LEWIS-KENDELL

I, Randell Lewis-Kendell, being duly sworn, hereby depose and say as follows:

1. My name is Randell Lewis-Kendell and I reside in Harwich Port, Massachusetts.

2. I am the surviving spouse of a 30-year, deeply committed relationship with Robert Lewis-Kendell ("Robert").

3. Robert died in November 2007, at age 72, after losing his long battle with recurrent colon cancer. I was at his side when he died.

4. Robert and I felt marriage was very important to us, and we married as soon as we were able to do so. After 27 years together as a committed couple, we were legally married on May 21, 2004, in Harwich Port, Massachusetts. Robert and I married to solidify our lifelong commitment. At the time of our marriage, we were both well aware of the serious nature of Robert's illness.

5. Robert and I began our relationship in 1977 while we were both living in Connecticut. Our relationship was rooted in deep love and close friendship.

6. Our families and community members welcomed our relationship from early on. Robert's now adult children have always treated me as their stepfather. When Robert's children were school-aged, I attended parent-teacher conferences with Robert.

Now Robert's children are grown, and their children call me "grandpa." I have always felt embraced by Robert's family, and I feel blessed because that warmth has continued even after his death.

7. In 1985, we moved together to Massachusetts. Robert was from a Boston suburb and he was eager to return to Massachusetts when the opportunity arose. Robert began working in fundraising and development. I worked in retail and became a manager at several stores.

8. In 1993, Robert and I realized our mutual dream of relocating to a small town on Cape Cod when we purchased a gift shop in Harwich Port, the Cranberry Goose.

9. Through our gift shop, Robert and I quickly became an integral part of the local business community. We also became active in our local church.

10. When we first moved to Harwich Port, we rented a house in West Dennis, while we worked to establish our gift shop. Because we reinvested all the money we earned in the business, we initially could not afford to purchase our own home in Harwich Port.

11. As time went on, we were fortunate to be able to purchase a small condominium in Harwich Port in 2006.

12. In 2002, Robert was diagnosed with colon cancer. Initially, he was treated with surgery and monitoring but then, in 2004, there was a recurrence, and Robert's prognosis became far more serious. In 2004, Robert began chemotherapy treatments.

13. I took Robert to every medical appointment, including appointments in Boston. I sat with Robert through every treatment and administered needed medications

at home. When necessary, I would close our gift shop to care for Robert. As Robert's condition worsened, I stayed with him at all times and took care of him.

14. I was at Robert's side when he died on November 14, 2007. Just before he died, we stayed up all night talking, sharing and affirming our commitment to each other. I remain committed to honoring Robert's memory and what he meant to me.

15. At the time of his death, Robert was receiving Social Security retirement benefits in the amount of $1,161 per month based on his lifelong earnings record. This benefit was a critical source of support for us.

16. Since Robert passed away, I have lived in difficult economic circumstances. The very challenging economy has reduced tourism, negatively affecting sales at the gift shop.

17. When I made Robert's funeral arrangements, the funeral director informed me about the $255 lump-sum death benefit from Social Security and mentioned that it could help me to defray some funeral expenses. The director made an application to social security on my behalf, just as he does for other surviving spouses. An employee of the funeral home expressed surprise and dismay that the benefit did not come through as it does for their other clients.

18. On December 21, 2007, I again applied for the lump-sum death benefit by going to the SSA office in Hyannis, Massachusetts. It was important to me to pursue this because I strongly believe I should be treated just like any other widower. I wish the denial of this $255 did not make a difference to me financially, but it does.

19. The SSA denied my claim by letter dated April 16, 2008. The letter stated that: "Since the Defense of Marriage Act prohibits SSA from finding that you and the

insured were married for benefit purposes, you are not eligible for the lump sum death payment."

20. I appealed because I think it is wrong for the federal government to dismiss my marriage to Robert, and to act like it didn't even exist.

21. My request for reconsideration was denied by the SSA in a letter dated November 19, 2008. I later entered into an Expedited Appeals Process (EAP) agreement with the SSA.

22. My experience of having my social security application denied was one of being treated unfairly during one of the most difficult periods of my life. I was mourning the loss of my husband, my life partner, and best friend, and the government was telling me that I don't count, that my marriage to Robert didn't count. This upset me deeply.

23. Another reason that I am pursuing the lump-sum benefit is because I am very worried down the road about not being able to access social security survivor benefits when I become age-eligible. Although both Robert and I always worked, Robert earned more than I did and, as his surviving spouse, I should be able to receive his benefit when I am old enough. I want to sort this out now and have my marriage treated fairly so that I can receive the correct benefit later on.

24. Because social security benefit amounts change each year, I cannot be sure exactly what amount I would be entitled to as Robert's surviving spouse once I become age-eligible. However, he was receiving $1,161 per month at the time of his death, and so I would expect to receive at least that amount per month, which is approximately twice what I expect to receive based on my own earnings record as reflected by my

social security earnings statements. If I cannot access spousal survivor benefits, my anticipated loss will be approximately $7,000 per year.

25. Because of my experience, I firmly believe that DOMA sends a message to businesses and others that my marriage was not real and this adds stress and confusion to everyday situations. For example, for many months after Robert's death, the mortgage company which held the mortgage on our home refused to speak with me because they didn't accept our marriage or understand my marital status. They did not think they had to recognize me or speak with me at all. I kept trying to call to negotiate the payments but they refused to speak with me even though I told them I was Robert's surviving spouse. Finally, after six months like this, I asked one of the mortgage company representatives "do you treat all surviving spouses this way?" and the representative seemed surprised and asked me to send my marriage certificate.

Signed under the pains and penalties of perjury on this 12th day of November, 2009.

/s/ Randell Lewis-Kendell

Randell Lewis-Kendell

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent ronically to the registered participants as identified on the Notice of Electronic Filing ') and paper copies will be sent to those indicated as non-registered participants on :mber 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
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DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)
)
Plaintiffs,)
)
v.)
)
OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)
)

JOINT AFFIDAVIT OF MARY RITCHIE AND KATHLEEN BUSH

Kathleen Bush ("Kathy") and Mary Ritchie ("Mary"), being duly sworn, hereby depose and say as follows:

1. Mary and Kathy: We have been a committed couple since 1990 and recently celebrated our 19th anniversary together. We live in Framingham, Massachusetts in a home we bought together in 1991.

2. Mary and Kathy: We married because a "marriage" is what we felt described the commitment and permanence in our relationship with each other. We married on the first weekend after marriage became available, on May 22, 2004. Our children, families and friends witnessed and celebrated with us. We have now been legally married for over 5 years.

3. Mary and Kathy: We are close with both of our large extended families, nearly all of whom live nearby. Between us, we have 10 brothers and sisters, and 15 nieces and nephews, along with 3 of our parents.

4. Mary: I have been with the Massachusetts State Police for 21 years. I graduated from the Police Academy in 1988 and joined the Massachusetts State Police as a Trooper that year. In 2005, I was promoted to Sergeant. In 2008, I qualified for a promotion to Lieutenant and am awaiting that appointment. Currently, I supervise major

crime scenes and crime scene forensics at one of the state's seven labs accredited by the Society of Crime Laboratory Directors.

5. Kathy: I am a college graduate and concentrated on the social sciences. For 15 years before taking leave to care for our children, I worked for the New England Journal of Medicine in sales and marketing.

6. Mary and Kathy: We decided that one of us would stay home when our children were born, so Kathy stopped working when our son Ryan, now 10, was born on January 13, 1999. We welcomed William, our second son, into our family 8 years ago on May 25, 2001.

7. Mary and Kathy: Our sons attend the local public schools. Both boys enjoy legos, soccer, baseball, and basketball. At school, Ryan particularly enjoys math and science, and he is learning to play the saxophone. William enjoys wrestling, art and is learning to play the drums.

8. Kathy: I try to keep our family connected when Mary works as well as all of those other times – day and night - when she is called in for emergencies or summoned to a crime scene. I have volunteered in our sons' school for years. I still read in the classroom, work in the library, and currently serve as Vice President of the PTO, an organization I joined when Ryan started kindergarten. In recent years, as a PTO Executive Board member, I have helped manage the budget and oversee fundraising for school programs.

9. Kathy: Being married to a State Trooper brings a special set of worries. I am aware every time I say goodbye to Mary that it could be the last time I do so.

10. Mary: We have purchased extra life insurance on my life because if I am killed in the line of duty, Kathy will not have access to the same benefits that other spouses of law enforcement officers receive under the federal Public Safety Officer Benefit laws. Although the death benefit would go to our children, Kathy would not necessarily be free to use it in the ways that she thinks best for the family under the difficult circumstances – as she would be able to do if it were paid directly to her as my spouse. Moreover, Kathy would not be eligible for the educational benefit that allows surviving spouses to re-train and get a job to support the family. The different treatment of my marriage is caused by DOMA.

11. Mary: DOMA has also increased the amount of federal income tax we have to pay. I claim the two children as my dependents, and I also claim Kathy as my dependent since she does not earn any income. But Kathy is not my "dependent," she is my spouse. It feels shameful, secretive and degrading not to be able to identify her as my spouse on the federal income tax forms.

12. Mary and Kathy: For the tax years since our marriage, that is from 2004-2008, we submitted amended federal income tax returns to the IRS, on IRS Form 1040X, changing our filing status from Mary filing as Head of Household to both of us filing together as Married Filing Jointly.

13. Mary and Kathy: Each of our amended federal income tax returns to the IRS included a claim for refund. We requested refunds as follows:

- In 2004: $1,054
- In 2005: $2,703
- In 2006: $4,390

- In 2007: $ 6,371
- In 2008: $4,548

14. Mary and Kathy: Each time we filed an amended federal income tax return, we attached to the IRS form 1040X an additional Form 8275, Disclosure Statement and the 8275-R, Regulation Disclosure Statement explaining our changes to the originally filed federal income tax return.

15. Mary and Kathy: For the 2004 tax year, the Attachment states:

Attachment To Form 1040X, Part II, Explanation of Changes
Form 8275, Disclosure Statement
Form 8275-R, Regulation Disclosure Statement
2004 Tax Year

REFUND CLAIM BASED ON THE UNCONSTITUTIONALITY OF THE "DEFENSE OF MARRIAGE ACT"

The taxpayer, Mary E. Ritchie, ID #[###-##-####], a spouse in a same-sex couple, was married under the laws of the Commonwealth of Massachusetts as of December 31, 2004. For the tax year of this amended return, the taxpayer filed a joint Massachusetts income tax return with her spouse as a married couple. However, in accordance with the federal law known as the Defense of Marriage Act ("DOMA"), the taxpayer filed an individual, federal income tax return as though she was unmarried. The taxpayer believes that being required to file as though she is unmarried amounts to unequal treatment compared to other married persons in Massachusetts. The taxpayer believes that her marriage, which is valid under Massachusetts law, should be respected for federal tax purposes, just like the Massachusetts marriages of heterosexual couples. Although this position is contrary to DOMA, the taxpayer believes that DOMA is unconstitutional and that she should be allowed to file this amended joint return with her spouse and receive the refund shown herein.

In particular, if the taxpayer were able to file as married filing jointly, such a filing status would affect the following adjustments:

The federal tax as decreased from $5,331 to $4,277.
The taxpayer previously paid $5,331 in federal income tax in her original return for this taxable year.
As a result of these adjustments, the amount of overpayment is $1,054.

16. Mary and Kathy: With each successive amended federal income tax return and refund claim filed, we included the same Explanation of Changes and Disclosure Statement Attachment described above, except that the tax year, amount of federal income tax paid and amount of refund claimed were adjusted to reflect the proper tax year.

17. Mary and Kathy: We also received letters from the IRS disallowing our refund claims for 2004-2007. For example, in 2004, under the heading "Why We Cannot Allow Your Claim," the IRS stated that: "[t]he Federal Government does not recognize same sex marriages and differs with Massachusetts on this point." In 2005, the letter simply said, "The Federal Government does not recognize same sex marriages." For our 2006 taxes, the IRS said "[c]urrent federal law does not recognize same sex marriage even if legally constituted by a sovereign state." In 2007, the IRS reply stated "[f]or federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife."

18. Mary and Kathy: We expect our pending amended return for tax year 2008 to be rejected as well.

19. Mary: Because we have not been able to file our federal income tax return as married filing jointly, and instead I have filed as a "head of household," we have paid a total of $19,066 more in federal income taxes than other married couples in identical circumstances from 2004 through 2008.

20. Mary and Kathy: We both would like to save for retirement, especially since Kathy is not earning money now in order to care for our children and manage the household given the demands of Mary's job.

21. Mary: Because Kathy has sacrificed her career in order for me to keep mine and also be at home with our children when I am away on police work, I would like to contribute funds to a 'spousal IRA' for Kathy and contribute to her and our retirement security in the future. Yet, I am unable to contribute to a spousal Individual Retirement Account ("IRA") for Kathy as other working spouses may do for their non-earning spouses. Specifically, due to our inability to file federal income tax returns as Married Filing Jointly, I cannot take the allowable tax deduction for any contribution to Kathy's IRA account, even though other working spouses can take the same deduction. Nor can I contribute on a tax-advantaged basis to Kathy's IRA as is ordinarily permitted for spouses under Section 219(c) of the Internal Revenue Code, as amended ("I.R.C.").

22. Mary and Kathy: We are careful with our money and have enough to live on. All the same, we would prefer that the extra federal income tax monies we have paid to go instead to supporting our children's lessons and sports fees, as well as savings for college and our own retirement. We expect this tax burden to carry on for another decade until our children are raised and it could be longer.

23. Mary and Kathy: Apart from all of the financial issues caused by DOMA, we feel like it undermines our marriage when compared to others, and therefore undermines our own security as a family. Even ordinary transactions like refinancing our house requires us to sit down and explain our situation as a couple who are married, but yet unmarried at the federal level. We still encounter people who think our marriage isn't real, or that there are really two kinds of marriages, those in Massachusetts and those in the rest of the country.

Signed under the pains and penalties of perjury on this 8th day of November, 2009.

/s/ Mary Ritchie

Mary Ritchie

/s/ Kathleen Bush

Kathleen Bush

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU, MARTIN KOSKI & JAMES FITZGERALD, DEAN HARA, MARY RITCHIE & KATHLEEN BUSH, MELBA ABREU & BEATRICE HERNANDEZ, MARLIN NABORS & JONATHAN KNIGHT, MARY BOWE-SHULMAN & DORENE BOWE-SHULMAN, JO ANN WHITEHEAD & BETTE JO GREEN, RANDELL LEWIS-KENDELL, and HERBERT BURTIS,

Plaintiffs,

v.

OFFICE OF PERSONNEL MANAGEMENT, UNITED STATES POSTAL SERVICE, JOHN E. POTTER, in his official capacity as the Postmaster General of the United States of America, MICHAEL J. ASTRUE, in his official capacity as the Commissioner of the Social Security Administration, ERIC H. HOLDER JR., in his official capacity as the United States Attorney General, and THE UNITED STATES OF AMERICA,

Defendants.

AFFIDAVIT OF MICHAEL LAMB, Ph.D.

I, Michael Lamb, Ph.D., hereby depose and say as follows:

PRELIMINARY STATEMENT

1. I am Professor of Psychology in the Social Sciences, Head, Department of Social and Developmental Psychology, Faculty of Social and Political Sciences, Cambridge University. I have been retained by counsel for Plaintiffs and by the Commonwealth of Massachusetts as a consultant in connection with both the above-referenced litigation ("*Gill*") and in *Commonwealth of Massachusetts v. United States Dept. of Health and Human Services, et. al*, Civ. A. No. 1:09-11156 JLT (D. Mass). I have actual knowledge of the matters stated in this affidavit and could and would so testify if called as a witness.

2. My background, experience, and list of publications from the last 10 years are summarized in my curriculum vitae, which is attached as Exhibit A to this report.

3. I hold a Bachelor's degree in psychology and economics from the University of Natal in Durban, South Africa (1972), Master's degrees in psychology from Johns-Hopkins University (1974) and Yale University (1975), and a Ph.D. in psychology from Yale University (1976).

4. I have held academic positions as Assistant Professor of Psychology at the University of Wisconsin, Assistant Professor of Psychology at the University of Michigan, and Professor of Psychology, Psychiatry, and Pediatrics at the University of Utah. In 2004, I took a position as Professor and Head of the Department of Social and Developmental Psychology at Cambridge University in the United Kingdom, where I am now employed.

5. From 1987 until 2004, I was head of the Section on Social and Emotional Development and a Senior Research Psychologist at the United States' National Institute of Child Health and Human Development, an institute within the National Institutes of Health (NIH).

6. I have authored more than 500 publications that have appeared either in peer-reviewed professional journals or in professional books published by academic presses primarily for the readership of other professionals. I have written or edited about 40 books in the field of developmental psychology, development in infancy, mother-child relationships, father-child relationships, the role of the father, sibling relationships, the effects of nontraditional rearing circumstances, the effects of daycare, child abuse, and forensic interview practices. A number of my books, including my books on nontraditional families, are used widely as texts in graduate courses.

7. I have been a peer-reviewer for various professional journals regularly for more than 30 years. I currently average two reviews of other professionals' work per week. In connection with my work as a peer-reviewer, I have peer-reviewed dozens of articles that address the parenting abilities of gay men and/or lesbians and/or their children's adjustment.

8. Over the past 35 years, I have pursued two broad areas of research. One line of research has focused on forensic issues such as the credibility of children and the best ways of eliciting accurate information from victims of child abuse. This work is not directly relevant to the present litigation. The other line of research is concerned with children's development and adjustment, especially the formative effects of the relationships that children establish with their parents and the ways in which these

relationships shape children's development over time. In this context, I have also examined factors that are likely to have an adverse effect on development, such as child abuse, and I have explored variations in rearing experiences that might affect child development, such as the effects of various types of nontraditional family forms. I am familiar with the research on families headed by gay and lesbian individuals and couples.

9. My initial research in the United States was about the formation of relationships between babies and their parents in households with a mother and a father. When I began my research, I focused on the role played by fathers in children's development. I later expanded my research in order to understand better the role that fathers play in children's lives – when they live with their children and when they do not, in both divorced and married families, and when they are highly involved or uninvolved in childcare.

10. In preparing this Affidavit, I reviewed the Amended Complaint in *Gill*, the Complaint in the *Commonwealth of Massachusetts* case, and the materials listed in the attached Bibliography. I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this Affidavit, as additional support for my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein.

I. Summary Of Ultimate Conclusions

11. Children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by heterosexual parents, including 'biological' parents. Numerous studies of youths raised by same-sex parents conducted over the past 25 years

by respected researchers and published in peer-reviewed academic journals conclude that children and adolescents raised by same-sex parents are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents, including 'biological' parents. Furthermore, the research makes clear that the same factors, as elaborated below, affect the adjustment of youths, whatever the sexual orientation of their parents.

12. It is beyond scientific dispute that the factors that account for the adjustment of children and adolescents are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of economic and socio-emotional resources. These factors affect adjustment in both traditional and nontraditional families. The parents' sex or sexual orientation does not affect the capacity to be good parents or their children's healthy development. There is also no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or well-being.

II. The Factors That Determine Children's and Adolescents' Adjustment

13. Psychologists use the term "adjustment" to refer to psychological well-being. "Adjustment" refers to characteristics (including the absence of psychological or psychiatric symptoms and the absence of behavior problems) that allow children or adolescents to function well in their everyday life. Well-adjusted youths have sufficient social skills to get along with others, to get along and comply with adults, to function well in school, to function effectively in the workplace, and establish meaningful intimate

relationships later in life. In contrast, maladjustment might be manifested by behavior problems, such as bullying and acting aggressively with others, or deficient social skills making it difficult for individuals to establish relationships with others, thus leaving them socially isolated.

14. Over the last 50 years, more than 1000 studies have examined the factors that predict healthy adjustment in children and adolescents. As a result of this significant body of research, psychologists have reached consensus on the factors that predict healthy development and adjustment. Among these are:

a) the quality of children's or adolescents' relationships with their parents or parent figures;

b) the quality of the relationship between the parents and other significant adults; conflict between them is associated with maladjustment while harmonious relationships between the adults support healthy adjustment;

c) the availability of adequate economic and social resources, with poverty and social isolation being associated with maladjustment, and adequate resources supporting healthy adjustment.

15. The quality of parent-offspring relationships is determined by the degree to which parents offer love and affection, emotional commitment, reliability and consistency, as well as the extent to which the parents 'read' their children or adolescents effectively and provide appropriate stimulation, guidance, and limit-setting. The better the quality of parent-child relationships, the better the children's or adolescents' adjustment is likely to be, whether the parents have same- or opposite-sex orientations.

16. Not all differences between youths are differences in adjustment. Many ways in which children or adolescents differ from each other are simply normal variations among people, and are unrelated to adjustment. For example, there has been considerable research on intelligence, but individual differences in intelligence are not viewed as markers of adjustment or maladjustment. Other normal variations can result from cultural differences (such as in assertiveness or individualism) or differences in personality (e.g., some children are extroverted while others are introverted).

III. The Factors Predicting Healthy Adjustment Are The Same For Traditional and Nontraditional Families, and Children or Adolescents In Nontraditional Families Are Just As Capable Of Healthy Adjustment As Those In Traditional Settings

17. In the social sciences, the term "traditional family" refers to the childrearing environment that social scientists formerly considered the norm -- a middle-class family with a bread-winning father and a stay-at-home mother, married to each other and raising their biological children. "Nontraditional" family forms, by definition, involve any kind of variation from this pattern. Thus, families with fathers who assume responsibility for childcare would qualify as nontraditional, as would families with employed mothers, with two employed parents, with one parent, or that rely on childcare centers instead of performing childcare exclusively within the home. Nontraditional families constitute the vast majority of families in the United States today.

18. Society's early assumptions about the superiority of the traditional family form have been challenged by the results of empirical research. Early in the Twentieth Century, it was widely believed that traditional family settings were necessary in order for children to adjust well. This view derived directly from psychoanalytic thinking that

was based on clinical observations, but not on empirical research. As psychoanalysis yielded to more empirically-based psychology over the early parts of the last century, it became clear that this notion was unsupported. Research beginning in the late 1940's and continuing until the present has tested many of the hypotheses that flowed from the assumption that children and adolescents need to be raised in traditional families in order to develop healthily. Specifically, there have been over 50 years of research into the effects on children or adolescents of having one parent, of divorce, and of maternal employment. Intense interest in the effects of daycare began in the 1970's, as did interest in highly involved fathers (stay-at-home fathers or families in which mothers and fathers share childcare responsibilities) and in same-sex families and households.

19. This research has demonstrated that the correlates of children's or adolescents' adjustment listed above are important regardless of whether children and adolescents are raised in traditional family settings or in nontraditional families. Children's or adolescents' adjustment depends overwhelmingly upon such qualities as the parents' affection, consistency, reliability, responsiveness, and emotional commitment, as well as on the quality and character of the relationships between the parents and their intimates, and on the availability of sufficient economic and social resources. Since the end of the 1980's, as a result, it has been well established that children and adolescents can adjust just as well in nontraditional settings as in traditional settings.

A. Difficulties in one-parent families have nothing to do with parental gender or sexual orientation; the absence of a father or of a mother, by itself, is not a predictor of healthy adjustment.

20. Numerous large-scale studies show that most of the children and adolescents who grow up in one-parent families are well adjusted. However, there is a

significant body of research on the impact of father absence, divorce, and one-parent family life demonstrating that children and adolescents in one-parent families are more likely to have adjustment difficulties than children and adolescents in two-parent families. Research shows that the reasons for this disparity are consistent with the predictors of adjustment generally. The primary causes of increased risk of maladjustment among children or adolescents in one-parent families are the reduced resources available when there is one parent, and the disruptive effects of and conflict associated with parental separation.

21. Many children and adolescents of parents whose relationships dissolve lose one of their supportive parental relationships, and do not get the benefit of both psychological and financial support from their non-resident parents. Additionally, many divorces expose children and adolescents to parental conflict both preceding and following the separation, may also involve rejection by or separation from one of the parents, and possible dislocations, such as moving to a new neighborhood and school. Finally, families headed by single mothers, in particular, often suffer considerable degrees of financial hardship because of a combination of factors including the continuing disparity in pay received by men and by women, and because many women, whether or not they were once married, have taken time out from the workforce to raise children.

B. Male and female parents can be equally competent; the absence of male or female parents in the home does not impair development.

22. Fifty years ago, it was widely assumed that the absence of a male parent figure accounted for the problems in adjustment encountered by some children and adolescents in single-parent families. However, extensive empirical research on

nontraditional families has demonstrated that father absence is not itself important to adjustment; instead, it is the quality of the children's experiences more broadly and, specifically the quality of the parent-child relationships, the quality of the relationship between the parents, and the adequacy of resources that explain the higher levels of maladjustment on the part of children and adolescents in one-parent families. It is well-established that both men and women have the capacity to be good parents, and that having parents of both genders does not enhance adjustment.

23. Studies have shown that, at the time that parents first receive their children, whether by birth or adoption, men and women are equivalently competent (or incompetent) at parenting. Most parenting skills are learned 'on the job.' Because women in this society on average spend more time on the job, they often become more skillful at it over time. However, this disparity in parenting skills simply reflects women's greater experience and greater opportunities to learn rather than a biologically given capacity. When men actively care for their children, they become more skillful, too. Nothing about a person's sex determines the capacity to be a good parent.

24. Many studies have pointed to differences between the ways in which mothers and fathers interact with their children, but this is not significant to adjustment. These studies suggest that, on average, men's patterns of interaction are dominated by a more boisterous, playful, unpredictable interaction, while women's patterns are more soothing, containing, and restrictive. However, these differences do not apply across the board to all men or to all women, nor is it harmful when parents do not assume traditional gender roles with respect to interactive parenting styles.

25. Male and female adults can adopt sensitive or authoritative parenting styles. When fathers are the primary caregivers, for example, the style of interaction between fathers and children often becomes more like typical mother-child interaction. The observed differences in parenting style appear to reflect, in large part, differences in the type of responsibility that the parent has within the home (i.e., differences between being the primary or secondary parent). Many children do not have parents who offer both of these parenting styles and this does not appear to be harmful.

26. There also is no empirical support for the notion that the presence of both male and female role models in the home enhances the adjustment of children and adolescents. Society is replete with role models from whom children and adolescents can learn about socially prescribed male and female roles. Some normal variations do characterize children and adolescents raised in some nontraditional settings, however. For example, such children often have distinctive attitudes about sex-role norms. Within the field, sex-role norms refer to the awareness of and beliefs in behavioral differences between boys and girls or men and women. In nontraditional families, children may have more flexible sex-role standards. This means, for example, that the children are more likely to think that both boys and girls can be astronauts or doctors, and that it is acceptable for both girls and boys to play with both trucks and dolls. By contrast, children raised in traditional family settings tend to have more sex-stereotypical notions about appropriate gender roles. Again, this variation with respect to sex-role norms is a normal variation, and has nothing to do with adjustment.

IV. Research Specific To Same-Sex Parenting Demonstrates That The Children and Adolescents of Same-Sex Parents Are Just As Well-Adjusted As Those With Heterosexual Parents.

A. Based on a significant and well-respected body of research, the scientific community has reached consensus that parental sexual orientation does not affect adjustment.

27. The body of research that has examined children's and adolescents' adjustment in the specific context of same-sex parenting represents approximately 30 years of scholarship and includes more than 50 peer-reviewed empirical reports. The earliest reports from studies of same-sex parenting were published in the late 1970's, and research has continued to the present. More than 100 articles about same-sex parents and/or their offspring have been published in respected academic journals or as chapters in books for use by other professionals. These present both qualitative research (relying primarily on interviews and discussions with either the youths or with the parents) and quantitative research.

28. The results of these studies support and are consistent with the results of the broader body of research on socialization in both traditional and nontraditional families. They demonstrate that the adjustment of children and adolescents of same-sex parents is determined by the quality of the youths' relationships with the parents, the quality of the relationship between the parents, and the resources available to the families.

29. They further demonstrate that adjustment is not affected by the gender or sexual orientation of the parent(s). Research comparing the adjustment of children and adolescents of same-sex parents with the children and adolescents of heterosexual parents consistently shows that the children or adolescents in both groups are equivalently

adjusted. The children and adolescents of same-sex parents are as emotionally healthy, and as educationally and socially successful, as children and adolescents raised by heterosexual parents. The social science literature overwhelmingly rejects the notion that there is an optimal gender mix of parents or that children and adolescents with same-sex parents suffer any developmental disadvantages compared with those with two opposite-sex parents.

30. There is consensus within the scientific community that parental sexual orientation has no effect on children's and adolescents' adjustment. Numerous organizations representing mental health and child welfare professionals have issued statements confirming that same-sex parents are as effective as heterosexual parents in raising well-adjusted children and adolescents and should not face discrimination. See Exhibit B. These organizations include the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children.

B. Studies identifying differences in the children or adolescents of same-sex parents have identified only normal variations, and not differences in adjustment.

31. Like children and adolescents in other nontraditional families, children and adolescents with same-sex parents have sometimes been found to have less sex-stereotyped beliefs, and to be more open in their views of societal norms and standards about appropriate behavior for males and females. For example, some studies of young children suggest that girls raised by lesbian mothers may play with both dolls and trucks,

and be more willing to think that being an astronaut or being a doctor are appropriate aspirations for girls as well as boys, than girls raised by heterosexual mothers. Although there was a time when some developmental psychologists believed that conformance to sex-based stereotypes was a component of healthy adjustment, this view has been discredited and abandoned. The differences seen in sex-stereotyped beliefs and behavior between children of lesbian and heterosexual parents are not differences in adjustment. Children and adolescents raised by same-sex parents do not differ from those raised by heterosexual parents with respect to gender identity, which is an aspect of psychological adjustment.

C. The methodology of the research examining same-sex parenting is standard, reliable, and accepted in the field.

32. Social scientists use and value diverse methodologies, research designs, and types of data that vary depending on the discipline involved, the specific area of research, the questions being raised, and the theories being applied and evaluated. Developmental psychologists (and psychologists more generally) tend to emphasize intensive examination of relatively small numbers of individuals, often studied in the context of social relationships and influences. Developmental psychologists rarely use research methods based on statistically representative national samples. Such large-scale survey research methods are often too blunt to address adequately the complex and nuanced questions that generally are at issue when scholars attempt to assess and compare the course of development in different circumstances. It is more common for researchers to use what might be called "convenience" samples, and to explore those samples intensively, rather than to study large samples more superficially.

33. The methodologies used in the major studies of same-sex parenting meet the standards for research in the field of developmental psychology and psychology generally. Proper research methods and standards in social sciences are determined through a rigorous peer review process that is conducted by established scholars in individual disciplines and sub-fields. When scholarly papers are submitted for publication, the research methods used, the analyses conducted, and the findings drawn are critically reviewed. In order to be published, an academic's work must satisfy the scrutiny and standards of scholars considered to be experts in the field of research under review.

34. The studies specific to same-sex parenting from which I draw my conclusions were published in leading journals in the field of child and adolescent development, such as *Child Development, Developmental Psychology,* and *The Journal of Child Psychology and Psychiatry.* The journals *Child Development*, published by the Society for Research in Child Development, *Developmental Psychology*, published by the American Psychological Association, and *The Journal of Child Psychology and Psychiatry* are the flagship peer-review journals in the field of child development. Most of the studies on which I rely appeared in these (or similar) rigorously peer-reviewed and highly selective journals, whose standards represent expert consensus on generally accepted social scientific standards for research on child and adolescent development. Prior to publication in these journals, these studies were required to go through a rigorous peer-review process, and as a result, they constitute the type of research that members of the respective professions consider reliable. The body of research on same-sex families is consistent with standards in the relevant fields and produces reliable conclusions.

D. Data concerning one-parent families does not support conclusions about the preferred gender of parents.

35. Research showing that children and adolescents in one-parent families are at greater risk of maladjustment than those raised by two parents is sometimes used to support the view that youths need both mothers and fathers, and therefore that heterosexual couples make the best parents. This mischaracterizes the research into one-parent families, which typically does not explore the effects of parental sexual orientation or gender.

36. Studies on the impact of one-parent family life generally compare one-parent and married-couple *heterosexual* parents; I am aware of no study that includes same-sex couples. Consequently, it is inappropriate to attribute the differences resulting from the number of parents and resources in a household to parental gender or sexual orientation, or to draw conclusions about the children of same-sex parents from these studies. The relevant studies do suggest, however, that, all other things being equal, children and adolescents tend to do better with two parents than one, and therefore, that children and adolescents with same-sex parents, like their peers, likely would benefit if their parents could choose to marry and solidify their family and parental ties.

V. Research Concerning The Benefits Of Being Raised By 'Biological' Parents Does Not Support Arguments That Same-Sex Couples Are Inferior Parents.

37. Others claim that children thrive in families with 'biological' parents and, by implication, claim that same-sex parenting is bad for children because same-sex parents cannot provide children with the advantages of being raised by their two biological parents. This argument is misleading. In many of the relevant studies, the

term 'biological' is used to distinguish between children raised by biological or adoptive parents, on the one hand, and those raised in nontraditional families, on the other. Children adopted early in life have similar outcomes to biological children. These studies thus provide no evidence in support of the argument that the children and adolescents raised by same-sex parents would be at psychological risk.

38. While some studies show that children do better when raised by their 'biological' parents than when raised by one 'biological' parent and the parent's new partner, these studies do not examine children being raised by same-sex couples, including the many who jointly planned to bring children into their families either by birth or adoption, and are jointly raising the children. Children in one-parent families or step-families are at a higher risk for adverse outcomes for reasons explained earlier (i.e., these children may have endured their parents' separations, exposing the children to parental conflict and related dislocations, the children may have experienced separation from or abandonment by parents, and the step-parents may have entered their lives relatively late in their development, affecting the quality of the parent-child relationships). One would not expect to see these difficulties in same-sex families who jointly plan to marry and have children. As explained above, the research comparing children with same-sex and opposite-sex parents shows no differences in outcome.

39. There is a substantial body of research on parents who have chosen to raise biologically unrelated children rather than remain childless. These studies show that such parents are at least as competent as parents raising their biological children; indeed, many studies show that these parents are more competent or committed in some respects.

VI. Children and Adolescents With Same-Sex Parents Would Benefit If Their Parents Were Permitted To Marry.

40. Marriage can yield important benefits for youths and families, including state and federal legal protections and social legitimacy. These benefits would be equally advantageous for children and adolescents in same-sex and opposite-sex families. Many lesbians and gay men already are parents, and it is in the best interests of their children for their parents to have equal access to the state and federal protections and benefits afforded through marriage.

41. The 2000 Census identified 594,000 households headed by same-sex partners. About a quarter of these had co-resident children. A total of 416,000 children were living in such households. Many more children (estimates vary from 6 million to 12 million) live with single gay or lesbian parents.

Signed under the pains and penalties of perjury under the laws of the United States this 11th day of November 2009.

By: /s/ Michael Lamb
Michael Lamb, PhD

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Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	Case No. 09-CV-2292 VRW **EXPERT REPORT OF NANCY F. COTT, Ph.D.**

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I. QUALIFICATIONS AND ENGAGEMENT

My name is Nancy F. Cott. I have been retained by Plaintiffs' counsel as a consultant in connection with the above-referenced litigation. My background, experience, and list of publications are summarized in my curriculum vitae, which is attached as Exhibit A to this report.

In the past four years, I have provided testimony by deposition in *Varnum v. Brien*, Iowa District Court for Polk County, Case No. CV 5965. I have not testified at a trial in any matter in the past four years.

My compensation for serving as an expert witness in this matter is a flat fee of $30,000.00. This fee is predicated on my hourly fee for expert services of $450.00 (thirty hours initially being given *pro bono)* and excludes any fees for my time while testifying at deposition. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

In connection with my anticipated testimony in this action, I may use portions of this report or the references cited herein as exhibits. In addition, I may use various documents produced in this case that refer or relate to the matters discussed in this report. I may also create, or assist in the creation of, demonstrative exhibits or summaries of my findings and opinions to assist me in testifying.

I may testify as an expert regarding additional matters, including (i) rebutting positions that the Defendants or Defendant-Intervenors take, including opinions of their experts and materials they discuss or rely upon; (ii) addressing issues that arise from any forthcoming Orders from Chief Judge Walker, (iii) addressing issues that arise from documents or other discovery that Defendants or Defendant-Intervenors or other entities have not yet produced, or

that were produced too late to be fully considered before my report was due; or (iv) responding to witness testimony that has not yet been given.

I reserve the right to supplement or amend this report based on (i) any Orders that Chief Judge Walker issues; (ii) documents or other discovery that the Defendants or Defendant-Intervenors or other entities have not yet produced; or (iii) witness testimony that has not yet been given.

In 1969, I received a master's degree in History of American Civilization from Brandeis University. In 1974, I received a Ph.D. degree in History of American Civilization from Brandeis University. Since that time, I have researched and taught United States history. I taught for twenty-six years at Yale University, where I gained the highest honor of a Sterling Professorship, and in 2002 I joined the faculty at Harvard University.

I am presently the Jonathan Trumbull Professor of American History at Harvard University. I teach graduate students and undergraduates in the area of American social, cultural and political history, including history of marriage, the family, and gender roles. I also am the Pforzheimer Family Foundation Director of the Schlesinger Library on the History of Women in America, Radcliffe Institute for Advanced Study.

I am the author or editor of eight published books, including *Public Vows: A History of Marriage and the Nation* (Harvard Univ. Press, 2000), the subject of which is marriage as a public institution in the United States. I also have published over twenty scholarly articles, including a number discussing the history of marriage in the United States. I have delivered scores of academic lectures and papers over the past thirty-five years on a variety of topics, including the history of marriage in the United States. I also have served on many advisory and editorial boards of academic journals.

I have received multiple fellowships, honors and grants, from a John Simon Guggenheim Memorial Foundation Fellowship in 1985 and National Endowment for the Humanities Fellowship in 1993, to a Fulbright Lectureship in Japan in 2001 and election to the American Academy of Arts & Sciences in 2008.

I spent over a decade researching the history of marriage in the United States, especially its legal attributes, obligations, and social meaning, before and while writing my book *Public Vows: A History of Marriage and the Nation.* The claims and evidence in this expert report come principally from the research for that book and are more fully documented there and in an article based on that research, "Marriage and Women's Citizenship," *American Historical Review,* 1998. The numerous historical sources, legal cases, and government documents that I studied and analyzed while researching and writing the book, as well as the other scholars' work that I consulted, are cited in my published footnotes in the book and article. In addition, I have supplemented my past research with more recent reading and research on matters referenced in this report. In preparing to write this report and to testify in this matter, I reviewed *Public Vows,* "Marriage and Women's Citizenship," and certain of the sources cited therein, as well as the materials listed in the attached Exhibit B. I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this report, as additional support of my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae, and on the materials listed therein.

II. SUMMARY OF FACTS AND OPINION

The opinions expressed herein are my true opinions as an expert in the history of marriage.

My report deals with the history of marriage as an institution created and authorized by law. In the United States, marriage has changed over time. It inherited and retained some

essential characteristics from the English common law, including its basis in free consent of the two parties, but in many other respects marriage has changed significantly to meet changing social and ethical needs.

Marriage in the United States has always been a civil matter, under the control of legislative and judicial authorities, rather than religious authorities. Religious authorities were permitted to solemnize marriages by acting as deputies of the civil authorities only, and were never permitted to determine the qualifications for entering, or leaving, a marriage.

The institution of marriage itself has served numerous purposes. No one outside a particular couple can describe their private, subjective experience of "being married," since this may vary as much as individuals vary. Historians can, however, document how the institution of marriage has functioned, changed, and been defined by law. Among the purposes that marriage and its regulation by civil authorities have served over this country's history are:

- to facilitate governance;
- to create public order and economic benefit;
- to create stable households;
- to legitimate children;
- to assign providers to care for dependents (including the very young, the very old, and the disabled), and thus limit the public's liability to care for the vulnerable;
- to facilitate property ownership and inheritance; and
- to shape the "people," or to compose the body politic.

The individual's ability to consent to marriage is the mark of the free person in possession of basic civil rights. This is compellingly illustrated by the history of slavery and emancipation in the United States. Slaves could not contract valid marriages. They did not

have the ability – the freedom – to consent to the obligations and duties that marriage entailed. After the Civil War, former slaves leapt at the new chance to contract marriage.

Marriage rules in several other past instances enforced inequalities among inhabitants of the United States. The most widespread examples were states' bans on marriages between whites and persons of color. Stringent policies directed against Chinese immigrants, combined with bans on white/Chinese marriages in numerous states, including California, resulted in uniquely harsh constraints on the Chinese population. Also, unequal consequences followed for male and female American citizens who married foreign nationals.

These applications of marriage rules have since been judged discriminatory and insupportable. Societal change over the centuries resulted in many features in marriage that are commonly accepted today but would have seemed unthinkable at the founding of the United States. Three areas of fundamental change illustrate this pattern:

a) Men and women were treated unequally, and asymmetrically, in marriage as defined under the common law. According to the marital doctrine of *coverture* or marital unity, the husband and wife were considered to be a single entity. The wife upon marriage ceded her legal and economic identity to her husband and was "covered" by him. A married woman could not own property, represent herself in court, sign a contract, or keep any money she earned. This inequality was once seen as essential to marriage but was eliminated in response to the demands of economic modernization and changing values. Today, the law treats both spouses equally and in gender-neutral fashion, and the U.S. Supreme Court has confirmed that such gender-neutral treatment for marital partners is constitutionally required. *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

b) Racially-based restrictions in a majority of states for much of the nation's history forbade and voided or criminalized marriages between whites and persons of color. California was the first state to strike down these restrictions as unconstitutional in *Perez v. Sharp*, 32 Cal.2d 711 (1948). The United States Supreme Court in *Loving v. Virginia,* 388 U.S. 1 (1967) ended the nearly 300-year history of race-based legislation on marriage.

c) Divorce grounds were few in early America, and divorce was always an adversary process, requiring one spouse to sue on the basis of the other's marital fault. Over time, states saw the need to liberalize grounds for divorce, and California led with the enactment of the first "no-fault" divorce law.

My research has led me to conclude that marriage is a capacious and complex institution. It has political, social, economic, legal, personal and emotional contents, and meanings and consequences that operate in more than one arena. The institution of marriage unites what are usually seen to be opposites: it is a paradoxical hybrid, combining public and private, status and contract, governance and liberty. Today marriage is both a fundamental right and a privileged status.

The close relation between marriage and government still stands today, most visibly in the form of benefits emanating both from federal policy and state law. As a social "safety net" has become a dimension of citizenship, these benefits have been channeled through marital couples and households. The General Accounting Office reported in 1996 that the corpus of federal law refers to more than 1,000 kinds of benefits, responsibilities and rights connected with marriage. Governments at every level give special recognition to marriage in areas ranging from immigration and citizenship, to tax policy, and property rules.

Marriage has lasted as well as changed throughout the centuries. Marriage retains its signal basis in voluntary consent, mutual love and support, and economic partnership. The changes in marriage observable over time have all been in the direction of increasing equality of the partners, gender-neutrality of marital roles, and control of marital role-definition and satisfaction by the marriage partners themselves rather than by state prescription. The institution has endured in great part because it has been flexible, capable of being adjusted by courts and legislatures in accord with changing ethical and moral standards.

The exclusion from marriage rights of same sex couples stands at odds with the direction of historical change in marriage in the United States. Other uses of marriage restrictions to discriminate between and among groups of citizens in their freedom to marry partners of their choice have been eliminated. Contemporary public policy assumes that marriage is a public good, and that excluding some citizens from the power to marry, or marking some as unfit to be part of the national family on the basis of their marriage choice, is not in keeping with public policy regarding either the benefit of marriage or the rights of citizens.

III. CIVIL CHARACTER OF MARRIAGE

From the very founding of the United States, marriage here has been an institution authorized and regulated by civil law. Each colony, state, and territory, including California, set up marriage laws and regulations among its very first founding legislation.

The initial English colonists in North America came from a mother country where the established national church ruled marriages. The Puritan colonists were breaking away from the established Anglican Church, however, and would not stand its authority over marriage. Rather, they believed that marriage was not a sacrament (as it was for Catholics) but a "civil thing," because it had so much to do with property and with two individuals' consent.

The great majority of colonists believed in basic tenets of Christian monogamy (as distinguished from the polygamous practices of some indigenous inhabitants of the North American continent, contemporary Persians, or the Jews of the early Bible, for example), but the colonial legislators intentionally established secular authority over the making and breaking of marriages. When the United States was founded the same principle was maintained, as necessary for a nation whose inhabitants were religiously diverse. Religious authorities were permitted by state laws to preside over marriage ceremonies, and could decide which marriages they would recognize according to the tenets of their own faith, but had no say in determining which marriages the state would recognize. California followed this pattern when it entered the Union in 1851 with a provision found first in its Constitution and then in its Family Code that "No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect." (Cal. Const., Appx. I, Art. XI, § 12 (current Fam. Code § 420(c)).) To be sure, for many Americans then and now, marriage also is invested with religious significance. Marriage ceremonies may and commonly do take a religious form, but it is the civil law that is authoritative over the validity of a marriage. Whether a marriage is recognized or not by a religion does not dictate its legality or validity.

Both legislatures and courts repeatedly through the nineteenth and twentieth centuries altered and adjusted marriage terms and rules. State legislators have not hesitated to exercise their jurisdiction to alter the terms of marriage, even if they rhetorically invoked the "laws of nature," and/or divine mandate, to justify a particular change.

Regulations governing marriage were considered to lie within the power of the several states, as part of their power over the "health, safety and welfare" of the population, and that role continues for the states today, subject to the requirements and protections of the federal Constitution. States set the terms of marriage, *e.g.,* who can and cannot marry, who can

officiate, what obligations and rights the marital agreement involves, whether it can be ended and if so, why and how, etc. A valid marriage in California must be preceded by a license, issued by the county official designated by the state, for example.[1] California's regulation of marriage is comprehensive, as one can readily see by perusing the Family Code.[2]

IV. PURPOSES OF MARRIAGE

Varying societies in different historical times and places have defined marriage in many ways. Marriage is an institution of human culture, and thus can vary as much as human cultures vary. What is seen as legitimate marriage in a given society can be, for instance, polygamous or monogamous, matrifocal or patrifocal, patrilineal or matrilineal, lifelong or temporary, open or closed to concubinage, divorce-prone or divorce-averse, and so on.

A. Marriage as a Form of Governance.

Marriage in our Western (and specifically Anglo-American) form has traditionally had a close relation to governmental authority. In the fifteenth through eighteenth centuries, the era during which our modern form of marriage was being forged, marriage itself was understood to be a form of governance. European and British monarchs were happy to see their subjects marry and form households, so that the household heads, acting as delegates of the king, would govern their own dependents. Monarchs had a strong interest in seeing that their subjects were not randomly arrayed but rather organized into governable subgroups – under male heads. Each head of household served as the king's delegate, in effect, in ruling his household. The rule of the male head of household over his wife, children, servants, apprentices and slaves is

[1] For California, *see Estate of DePasse*, 97 Cal. App. 4th 92, 103 (2002) ("The state has a vital interest in the institution of marriage and plenary power to fix the conditions under which the marital status may be created or terminated.")

[2] *See* Fam. Code §§ 300-5604.

now quite archaic, but marital household units still serve a governance function among the populace.

When the United States was established on republican principles, rejecting monarchy, that shift did not break the continuum between understandings of political governance and marital governance. Sovereignty in the new United States was understood to be based on the voluntary consent of the governed (rather than on subjection to a ruler). That provided a perfect analogue to the basis of the marital household in consent. The Revolutionary statesman and legal philosopher James Wilson saw mutual consent as the hallmark of marriage, more basic even than cohabitation. "The agreement of the parties, the essence of every rational contract, is indispensably required," he noted in lectures of 1792. Parallels between the consent and love on which marriage should be based, and on which allegiance to the new United States should be based, were very common in Revolutionary-era rhetoric.

B. Marriage Creates Public Order and Economic Benefit.

Representative government and marriage were both seen as serving public order in the Revolutionary era as they are today. Because of its importance in creating and serving public order in American society, governments encouraged as well as regulated marriage. Marriage in the United States does now and always has organized households and figured largely in property ownership and inheritance. These are matters of civil society in which public authorities are highly interested.

Governments have encouraged people to marry for economic benefit to the public, as well as to themselves. The marriage bond creates economic obligations between the mutually consenting parties and obliges them to support their dependents. In early America, marital households were formed not only on the principle of governance by a male head, but also on presumptions about a "natural" sexual division of labor. That is, men and women were

assumed to be capable of, and prepared for and good at, distinctively specialized kinds of work, both kinds equally necessary to human sustenance, to survival, and to society. (Men plowed the fields to grow the grain, and women made the bread from it, for example.) Marriage set the arrangements fostering the continuation of this sexual division of labor, especially through the doctrine of *coverture*. *See* Section VI (A), below.

Households were the basic economic unit in early America. They organized the production of food, clothing and shelter for individuals. Early American families often included more than parents and children; grandparents or unmarried relatives might also be present, as well as unrelated apprentices or other adolescent helpers. The household served to establish a support system for all of these members, not only for biological offspring of the married couple. To a very great extent, "family" and "household" were used as synonyms. (Thus a Southern planter would speak of "my family white and black" to refer to his household composed of relatives and slaves.) When statesmen or legislators said that *families* were the foundation of society, or of the republic, they meant that *households* – those sub-units governed by male heads – were the basis both politically and economically of the larger unit, the commonwealth or state.

Legislatures and courts in the United States since the nineteenth century have actively enforced the economic obligations of marriage, requiring spouses to support one another and their dependents and thus minimize public expense for indigents. This is still true today, although economic units far more powerful than households drive the economy. Marriage-based households are still the principal vehicles for organizing economic sustenance and care, including for dependents (whether young, old, or disabled) who cannot labor to support themselves, while government benefits supplement with assistance for some of the latter.

The economic dimension of the marriage-based family has taken on a new aspect as government benefits expanded during the twentieth century. That is, government programs such as veterans' survivors' benefits and social security benefits are directed not only toward individuals but toward the benefit of their legally married spouses and dependents. Today, the United States is emphatic in its public policy of channeling economic benefits through family relationships based on marriage. Social security and veterans' survivors' benefits, intestate succession rights, pension benefits, and jail visitation privileges, for example, are extended to legally married spouses, but not to unmarried partners.

C. Marriage Shapes the American People and the Polity.

The ability or willingness of married couples to produce progeny has never been necessary for marriage validity in American law. For example, women past menopause have never been barred from marrying, nor divorceable after a certain age. Men or women known to be sterile have not been prevented from marrying, nor could a marriage be annulled for an inability to bear or beget children. Indeed, George Washington, known as the "father of his country," was sterile, and known to be so when he, as a married man, became president of the United States.[3]

To be sure, when the United States was a young nation, it was land-rich and population-poor; states and the federal government thought that economic growth was predicated on growth in population, and wanted to see the free white population increase. Thus naturalized citizenship for free white immigrants was facilitated, and so was marriage. State governments

[3] Washington was assumed to be sterile because he fathered no children with either his first or second wife, although his second wife had given birth to children during her previous marriage. The fact that he could not father progeny was seen as an advantage in his candidacy for the presidency, since anti-royalists feared the presidency would become a hereditary office like kingship. In an early draft of his inaugural address he included this point (deleted in the final) "the Divine providence hath not seen fit that my blood should be transmitted or my name perpetuated by the endearing though sometimes seducing, channel of personal offspring." Paul F. Boller, Jr., *Presidential Inaugurations* (New York: Harcourt, 2001), p. 4.

encouraged marriage (among whites), so as to see that natural population growth would take place within legitimate households bound to support dependent minors. Sexual intimacy was expected in marriage to the extent that the common law (and many later state statutes) made sexual incapacity a reason for annulment.[4]

State governments have bundled together legal obligations with social rewards in marriage, to encourage couples to choose committed relationships of sexual intimacy over transient relationships, in the interest of public order, whether or not these relationships will result in children. This was true in the past when households more often included large numbers, as well as today, when most households and families are small. In the past, older adults – widows and widowers – remarried whenever a willing mate could be found; although it was often clear that no children would result, marriage was desirable because a married couple had the wherewithal to form a stable household of their own with the expected division of labor. In our contemporary post-industrial economy, many divorced or widowed older adults marry when they are past childbearing age, usually for reasons of intimacy and stability. Ever since the 1920s, when reliable birth control became available for those in the know, sexual intimacy has been seen as separable from necessary reproductive consequences even for those of reproductive age. Since then – and even more commonly since contraception became more sure and widely available in the 1960s – couples with no interest or expectation of child-bearing marry, and re-marry. Population growth is no longer necessarily seen as so desirable; immigration is curtailed rather than encouraged, and still, governments build rewards as well as obligations into marriage, to encourage couples to form stable rather than transient relationships.

[4] An annulment for sexual incapacity depended upon a complaint by one of the marital partners. Nothing would have prevented a marriage that was known to be incapable of producing children, provided that the marriage was desired by both parties. Sterility or infertility was never a basis for invalidating a marriage.

Arguably, marriage rules in the United States have aimed more consistently at supporting children than producing them. Support for any child born or adopted into a family always has been an obligation of the household head; today, it is a shared responsibility – as much in the case of divorce or separation as in an intact marriage. Such rules have put a critical limit on the public's responsibilities for the young and dependent.

In addition to reflecting concerns about population size, marriage laws also reflect policies about the composition of the population and thus have been used to shape the polity itself. Any modern nation-state is concerned with the extent and character of its people. Sovereign states, by declaring which marriages are allowed and which are not, directly affect the reproduction and composition of the population declared to be legitimate. Marriage rules thus join naturalization and immigration policies in sculpting the characteristics of the body politic. Marriage policy is all the more important in shaping "the people" in a nation of immigrants such as the United States, where disparate ethnic, religious, and cultural groups are likely to amalgamate, and birth in the dominion warrants national citizenship.

By creating incentives for some kinds of marriages and disincentives for others, by preventing or punishing some marriages and not others, states of the United States have, historically, used marriage rules and exclusions deliberately. A long history of regulations nullifying or criminalizing marriage between whites and persons of color in the United States, for example, has signally shaped the racial order. *See* Section V, below.

V. UNEQUAL APPLICATION OF MARRIAGE RULES

Our country's history reveals a number of striking instances in which marriage laws were used to discriminate among actual or prospective members of the populace, creating hierarchies of value and benefit, declaring some persons more worthy of the freedom, liberty and privacy inherent in marriage rights than others. These laws created or enforced inequalities

which seemed obvious and right to their enforcers, and were justified by their supposed naturalness, although to us today they seem patently unfair and discriminatory.

A. Denial of Valid Marriage to Slaves.

The most major and striking exclusion from legal marriage in the history of the United States is in the case of slaves. Themselves owned as property, slaves lacked the capacity – the free status – to consent; and since individual consent was essential to the matrimonial contract, slaves could not enter it. Slaves' inability to undertake valid, legally recognized marriages was one, signal form of their deprivation of basic civil rights (that is, rights to one's body, liberty and property). Furthermore, marriage obliged those undertaking it to fulfill certain duties defined by the state, and a slave's prior and overriding obligation of service to the master made carrying out the duties of marriage impossible.[5]

Where slaveholders permitted, slave couples often wed informally, creating family units of consoling value to themselves. But slaveholders broke up slave unions with impunity when it suited them. Slave marriages received no defense from state governments; that lack of public authority was the very essence of their invalidity. Just as important, while these informal unions were valued in the slave community, they received no respect from white society. Having denied legal marriage to slaves, slaveholders called them sexually "lewd" or "promiscuous" and lacking in moral values.

After emancipation, in reaction and in contrast, former slaves flocked to get married legally. As free persons, African Americans welcomed the ability to marry as a civil right long denied to them. They saw marriage as an expression of their new gain of rights, and a recognition that they were individuals who could lawfully consent to marry a chosen partner.

[5] Indentured servants during the colonial era, usually white persons, also typically were prevented from marrying, for the same reason that being bound to give all their duty and labor to their masters, they could not carry out the duties of marriage. Indentured servants usually began as teenagers, however, and the period of indenture expired after seven years; also, the prohibition could be overridden by the master's consent, which was sometimes given.

The Freedmen's Bureau, in control of the transition of former slaves into citizens in the occupied South after the Civil War, avidly fostered marriages among them. The Freedmen's Bureau, as well as the United States Congress that passed the Thirteenth, Fourteenth and Fifteenth Amendments, wanted the freedpeople to embrace both their new work contracts and their new marriage contracts, in order to become organized in self-supporting male-headed households. Besides endorsing this as a basic right, Union officials welcomed the governance functions of marriage among the African American population.[6]

B. Denial of Valid Marriage to Couples Marrying Across the Color Line.

The denial of valid marriage to slaves was based on their status as unfree persons, rather than on their race or color *per se*. Another, separate form of race-based differentiation and discrimination in marriage laws began in the American colonies in the late seventeenth century. These were bans on marriages between whites and persons of color usually denominated "Negroes" and "mulattoes." Several early colonies also banned marriage between whites and the indigenous inhabitants of North America.[7]

These bans continued and were multiplied by actions of additional states, once the United States was founded. After the Civil War, more states than ever made intermarriage between blacks and whites void or criminal. County clerks who were charged with issuing marriage licenses typically enforced these laws. In the 1860s, five Western states added the categories of Indians, Chinese and "mongolians" to those (black and mulatto) already

[6] In a few locales, when white Southerners resumed public authority upon the Freedmen's Bureau's departure, these officials tried to thwart legal marriage for former slaves by refusing to grant marriage licenses or charging prohibitive fees to them. These officials viewed former slaves as unworthy of the affirmation of freedom and civil rights embodied in choosing valid marriage, and wanted to bar them from the respectability of the institution. More often, however, Southern authorities who deemed the freedpersons unworthy of equal rights misused marriage rules in a different way, by punitively enforcing the policing functions of marital duty and prosecuting African Americans but not whites for minor infractions of the marriage bargain.

[7] Pocahontas's marriage to John Smith in colonial Virginia is the stuff of song and story, but it was highly atypical. Colonial Virginia in 1691 prohibited marriage between any white man or woman and "any negroe, mulatto, or Indian man or woman bond or free."

prohibited from marrying whites. With the further development of notions of "race" called scientific at the time, such laws (especially in the West) became more complex in naming proscribed marriages. As many as forty-one states and territories of the U.S for some period of their history banned or nullified or criminalized marriages across the color line, often using "racial" classifications that are no longer recognized today.[8]

These laws did not completely exclude anyone from entering marriage, but deeply constrained free choice of marital partner. Couples in love across the color line had to settle for informal marriage and the prospect of consequent lack of respect in their communities, or alternatively marrying someone other than the person they loved. For the discussion of the abolition of such racial restrictions on marriage, *see* Section VI (B), below.

These laws exemplified states' use of marriage laws to discriminate among Americans, thereby endorsing a hierarchy of relative worthiness. Courts in the late nineteenth century usually responded when such laws were challenged (as they were, after the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment's ratification), by saying that there was no discrimination involved: both blacks and whites were equally forbidden from marrying each other. The judicial defense of the "symmetry" of the prohibition failed to acknowledge the actual and symbolic significance and consequences of such laws, in a society where whites were the large dominant majority of the population and persons of color an often-despised minority.

C. Unique Marital Constraints on Asians.

Limitations on immigration and marriage aimed at Asians combined for a uniquely limiting and discriminatory effect. Here, for a time, federal and state policies on marriage

[8] It should be noted that the phrase "interracial marriage bans" incorrectly captures the character of these laws, which never barred marriage between African Americans and Chinese, for example, or between Indians and "Malays." These laws pertained only to marriages of whites to other persons.

converged to prevent citizens of Asian descent from becoming part of the "body politic."

Beginning in the 1860s in California, where Chinese male laborers had been recruited to work on the completion of the transcontinental railroad, there was considerable animus against Chinese immigration voiced by white American workers. By 1882, Congress passed an act excluding from the nation all Chinese laborers. Even before that, Congress had passed an act aimed at excluding Chinese women, who were presumed to come to the United States only for prostitution. The Page Act of 1875 prohibited and criminalized the entry or importation of all prostitutes, and required the United States consul to investigate whether any immigrant woman debarking from an Asian country was under contract for "lewd and immoral purposes."

The Page Law almost entirely ended the entry of Chinese women through American ports, and the Exclusion Act reduced immigration from China altogether to a trickle of specific categories of merchants, ministers, sojourners, and students. This meant that Chinese men still in the United States (who numbered fewer than 100,000 in 1882 and were concentrated in states whose laws banned their marriages to whites) had hardly any possibility of marrying legally, being able to choose only a partner from another group deemed nonwhite.[9] Chinese immigrants were barred at this time from becoming citizens through naturalization.[10]

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[9] The beginnings of Chinese-American communities in the West came from the small numbers of merchants (who were allowed to bring their immediate family members), teachers and sojourners, etc., who were allowed to enter the United States under the Exclusion Laws, and decided to stay. Also, in New York and most other eastern states, there was no ban on Chinese marriage to whites, and while such marriages were strongly reprobated by whites, they did occur. The children of Chinese parents born on United States soil became citizens under the provisions of the Fourteenth Amendment. In *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898), a divided Supreme Court affirmed that such U.S-born children of Chinese immigrants were citizens. That this question was legally contestable to the level of the U.S. Supreme Court at the time, and that the Court was divided, indicated the extent of anti-Chinese animus, given how clear the language of the Fourteenth Amendment is on the point.

[10] The naturalization law of 1790 admitted and welcomed into citizenship only "free white persons." In 1870, in the wake of emancipation, Massachusetts Senator Charles Sumner pressed the Senate to end the racial constraint on naturalization. Because of the clamor in California at the time, however, he was unable to convince the Senate to remove racial limitations entirely. Instead, persons of African descent were added to "whites" as those eligible. Thus all foreigners in the United States who were not recognizably "white," nor of African descent, became "aliens ineligible for citizenship." Many Western states, including California, also passed a number of discriminatory laws aimed at such aliens, depriving them of rights to hold property and much more.

The status of Asians resident in the U.S. as "aliens ineligible for citizenship" then interacted with federal policy on the citizenship status of American women who would marry aliens, to disable Asian men's ability to marry even further. See Section V (D), below.

D. Punitive Consequences for American Women Who Married Foreigners.

In 1855, Congress legislated that an American man choosing a foreign bride made her a citizen simply by marrying her, provided that she was free and white. Operating, in effect, as an international extension of the doctrine of *coverture*, this law said that an American man by marrying a foreign woman "covered" her with his citizenship. Although the law was unclear for the next half-century as to the effect of a marriage between an American woman and a foreigner, that doubt was erased in 1907, when Congress adopted legislation that declared "that any American woman who marries a foreigner shall take the nationality of her husband." Where in 1855 Congress had invited men to absorb and replace the national identity of the women of "other" groups, the 1907 statute forcefully warned American women that they would become aliens in their own country if they married outsiders. This complete gender asymmetry in consequences of marriage choice followed the logic of *coverture*.[11]

Federal immigration policy here dealt differentially, and in a way we today judge discriminatorily, with male citizens and female citizens in their choices to marry foreigners. The marriage choices of one group of citizens were confirmed by their spouses being welcomed into the nation; the marriage choices of another group of citizens were so far differentiated as to deny their belonging to the nation at all.

In the wake of women's enfranchisement by the Nineteenth Amendment, however – and under pressure from women citizens – the Cable Act of 1922 addressed this inequity,

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[11] Seemingly uncontemplated by Congress, this provision could (and did) cause statelessness for some American women marrying foreign nationals, if the husband's nation did not follow the *coverture* practice in nationality.

ostensibly providing "independent citizenship" for married women. But the Cable Act provided that an American woman's marriage choice of a foreigner changed her citizenship status – even if she was descended from the *Mayflower* – into that of a naturalized citizen. Inferior features of naturalized citizenship at the time meant that if she lived for two years in her husband's country (or five years in any foreign nation), she would forfeit her American citizenship.[12]

The Cable Act also built in a racial prejudice: American women who married foreigners "ineligible for citizenship" (that is, those like Asians who did not meet the racial requirements for naturalization) still were deprived of citizenship. If the woman had birthright citizenship but did not meet the (racial) requirement for *naturalized* citizenship, marrying an Asian made her an alien for life, regardless of the duration of her marriage. This double whammy seemed aimed – or, at the very least redounded – to further deprive older Asian men living in "bachelor" communities of potentially legal marriage partners. The small numbers of younger-generation Asian American women citizens, born on American soil, faced the disincentive of loss of citizenship by marriage to such an Asian man, and even if the marriage ended through divorce or the husband's death, the wife, being barred by racial limitations, could never regain her citizenship through naturalization.

Within a half-century, however, changing values on gender equality and racial equality, bringing new recognition of discrimination on the basis of sex and race where it had not before been perceived, translated into legal changes in marriage rules. *See* Section VI, below.

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[12] The Cable Act also overruled the act of 1855, replacing the automatic citizenship for a foreign national marrying an American man with a streamlined waiting period of only one year before the possibility of naturalization, instead of the standard five years. This change had to do with many congressmen's fear that ignorant foreign-born women might too easily (under the 1855 law) become voters, by marrying American men. Thirdly, the Cable Act enabled the female partner in an immigrant couple to apply for naturalized citizenship even if her husband remained a non-citizen.

VI. CHANGE IN MARRIAGE IN RESPONSE TO SOCIETAL CHANGES

As shown above, the institution of marriage has been shaped by legislators and judges to meet different purposes over time. Marriage in the United States has proved to be a flexible institution. Like other successful civil institutions, marriage has evolved to reflect changes in ethics and in society at large. Marriage has been longlasting as a major feature of our society because it has been flexible, not static. Adjustments in key features of marital roles, duties, obligations and rules of entry have preserved the appeal and value of marriage in our dynamic society.

Changes in marriage in the past were not readily welcomed by all, and were often difficult for some in society to accept. Indeed, many features of contemporary marriage that we take for granted – such as the ability of both spouses to act as individuals while married, to marry across the color line, or to divorce for reasons of their own – were fiercely resisted when first introduced and were viewed by opponents as threatening to destroy the institution of marriage itself.

Three major areas of change over time illustrate ways that civil marriage has been modified by the actions of courts and legislatures to adapt to societal changes; showing the resilience that has kept the institution of marriage vigorous and appealing: (a) spouses' respective roles and rights; (b) racial restrictions; and (c) divorce.

A. Spouses' Respective Roles and Rights.

Traditionally, marriage law and practice gave very different roles and legal rights to husbands and wives. The bargain of marriage under the common law, and as translated into American statutes, presumed and prescribed profound asymmetry in the respective roles and rights of husband and wife. Over time our country has moved to gender parity within and outside the institution, which was unthinkable to most Americans at the founding.

Historically, Anglo-American marriage law was based on the legal fiction that married couples were a single entity, with the husband serving as the sole legal, economic and political representative of that unit, and the woman's identity merging into her husband's. This doctrine of marital unity was called *coverture*, and reflected society's views of the marital couple as a unit naturally headed by the husband. Under *coverture* doctrine in American law, the wife had no separate legal existence. (That is why Ann Doe became Mrs. John Smith.) A married woman could not own or dispose of property, earn money, have a debt, sue or be sued or enter into an enforceable agreement under her own name, because her husband had to represent her in these things. Neither married partner could testify for or against the other in court – nor commit a tort against the other – because the two were considered one person. The two partners were assigned opposite economic roles understood as complementary: the husband was bound to support and protect the wife, and the wife owed her service and labor to her husband.

During the mid-1800s, the notion that married women had no legal individuality apart from their husbands began to clash with the realities of developing society. The static rural economy in which the coverture doctrine had been born had given way to a dynamic market economy. While *coverture* defined the roles of the two spouses as absolutely different, in practice the tasks of husband and wife began to overlap. Wives began to claim their rights to hold property and wages they owned or earned in their own names. Cooperative husbands in harmonious marriages saw advantages in their wives having some economic leverage. Judges and legislators also saw advantages, in keeping families supported on both spouses' assets rather than the husband's only, because a wife's separate property could keep a family solvent if a husband's creditors sought his assets. Married women able to earn their own income could support their children if their husbands were profligate, causing savings for the public purse.

The property basis of *coverture*, in place for hundreds of years and understood as absolutely essential to marriage, was eliminated by all the states over an extended period of time. Far from viewing marriage as immutable, courts and legislatures altered marriage fundamentally in order to take account of societal needs and spouses' evolving relationships within their households and in the larger society. Early in California's statehood, its Supreme Court affirmed the wife's right to her separate property, including her ability to defend it by suit in court. For example, *Wilson v. Wilson,* 36 Cal. 447 (1868) stated: "The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and . . . [this recognition] involves a necessity for opening the doors of judicial tribunals to her, in order that the rights guaranteed to her may be protected and enforced." (*Id.* at 454; and see also *Alexander v. Bouton,* 55 Cal. 15, 19 (1880) (a wife "has the absolute right to use and enjoy [her separate property] and the rents, issues, and profits thereof, and to dispose of the same, by her own act and deed, without the consent of her husband.")

The unseating of *coverture* was a protracted process, because it involved revising the gender asymmetry in the marital bargain. The assumption that the husband was the provider, and the wife his dependent, did not disappear as soon as the wife became legal owner of her own property and wages earned outside the home. As late as the mid-twentieth century, the hand of the past showed itself most with regard to the wife's household labor, traditionally seen as her husband's domestic right. A legal writer in the 1930s noted that "the courts have jealously guarded the right of the husband to the wife's service in the household," as part of the legal definition of marriage. Judges saw the wife's service as a necessary corollary to the

husband's asymmetrical obligation of support; every state legally obliged the husband to support his wife and not vice-versa.[13]

When, during the New Deal, the federal government was called upon to include social entitlements in the definition of citizenship, this marital patterning of the husband as provider and the wife as his dependent became important in a new way. Federal benefit programs such as the Social Security Act built in special advantages for spouses and families based on valid marriage. These programs also incorporated strong gender asymmetry with respect to husbands' and wives' entitlements. Legal challenges to this sex differentiation between marital partners in federal benefits took place in the 1970s. The United States Supreme Court then found the gender asymmetry in marital benefits offered under federal law unconstitutionally discriminatory, and eliminated it. Spousal benefits have been gender-neutral ever since, while continuing to give special benefits to married couples. The same change to gender-neutrality (with marital advantage) took place in veterans' benefits. (*See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973)). The unequal citizenship consequences for American women as compared to American men who chose to marry foreign nationals, including Asians, were also dismantled during the twentieth century.

For couples who consent to marry today, marriage has been transformed from an institution rooted in gender inequality and gender-based prescribed roles to one in which the contracting parties decide on appropriate behavior toward one another, and the sex of the spouses is immaterial to their legal obligations and benefits. The two partners in a marriage are

[13] The laws requiring husbands' support – although by no means wholly effective inside marriage or out – had consequences in the labor market, disadvantaging married women seeking employment, in marital roles and relative power, as well as having coercive force over husbands, who could be thrown in jail for nonsupport.

still economically and in other ways bound to one another by law. But the law no longer assigns asymmetrical roles to the two spouses.

Courts and legislatures have changed laws governing the meaning and structure of marriage to keep it current with the time. The gender equality of marriage today would profoundly shock any American from the era of the American Revolution, or the Civil War. But they would recognize in contemporary marriage the institution's foundation in two consenting parties freely choosing one another.

B. Racial Restrictions.

Despite the principle of freedom of choice intrinsic to consent-based marriage, there were racially-described legal bars on certain marriage choices for hundreds of years in the United States. *See* V (B), above. The eventual lifting of these laws was consistent with increasing emphasis on marriage as a fundamental right. The right to marry was formally determined to be a fundamental right early in the twentieth century, first articulated by the Supreme Court in 1923.[14] Yet racially-based marriage bans continued to be reinvented, with Virginia passing the most restrictive law in the nation the very next year, in 1924.

Slowly but unmistakably, however, social and legal views changed. As generations after emancipation passed, an increasing minority of Americans began to see these laws to be inconsistent with principles of equal rights and damaging to members of nonwhite groups. Courts and society came to see these marriage restrictions as inconsistent with the fundamental right to marry.

California's was the first state high court to hold that race-based restrictions on marriages were unconstitutional, in 1948. At that time thirty states banned interracial

[14] *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942).

marriages. The California Supreme Court recognized that freedom in exercising the "fundamental right" to marry was "essential to the orderly pursuit of happiness by free men." *Perez v. Sharp,* 32 Cal.2d 711, 714 (1948). The Court struck down race-based restrictions on one's choice of a marriage partner, holding that legislation addressing the right to marry "must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." *Id.* at 715. More than a dozen states eliminated their own race-based laws in the two decades after the *Perez* decision

Eventually, the principle of freedom of choice of one's marriage partner triumphed nationwide in *Loving v. Virginia,* 388 U.S. 1 (1967). The *Loving* court ended the long history of race-based legislation of this sort by striking down Virginia's law that made marriage between a white and a non-white person a felony. Thus marriage rules that had prevailed in American colonies and states during three centuries were eliminated in one decision in 1967. (At the time *Loving* was decided, sixteen states still banned interracial marriage.)

Chief Justice Earl Warren's opinion rejected the longstanding contention that bans on marriage across the color line imposed on both races equally. He called such laws "measures designed to maintain White Supremacy" (*id.* at 11) that were insupportable in view of the Fourteenth Amendment – although eliminating such laws had not been a purpose of the Congress that drafted the Fourteenth Amendment. Indeed, the congressmen crafting the language of both the Civil Rights Act of 1866 and the Amendment itself had been actively concerned to *avoid* eliminating these laws.

The court's opinion in *Loving* reiterated clearly that marriage was a "fundamental freedom."[15] Since then, the United States Supreme Court has rejected as unconstitutional

[15] *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our existence and survival."). Chief Justice Earl Warren, who wrote the unanimous decision, had been governor of

various impositions on the right to marry imposed by state laws, such as those that prevented parents in arrears on their child support obligations, and incarcerated felons, from marrying. (*See, e.g., Zablocki v. Redhail,* 434 U.S. 374 (1978); *Turner v. Safley,* 482 U.S. 78 (1987).) The Supreme Court in *Zablocki* firmly restricted statutory classifications that would "attempt to interfere with the individual's freedom to make a decision as important as marriage." 434 U.S. at 387 n. 12.

Today virtually no one in the United States questions the legal right of individuals to choose a marriage partner without government interference based on race. A prohibition long embedded in our laws and concepts of marriage has been entirely eliminated. The *Loving* court strengthened and validated the institution of marriage within society, affirming that freedom of choice of one's partner is basic to each person's civil right to marry.

C. Divorce.

Legal and judicial views of divorce likewise have evolved to reflect society's view of marriage as an embodiment of choice and consent, in which the marriage partners decide themselves what is an appropriate enactment of their marital roles.

Divorce was possible in some of the English colonies and was introduced in several states immediately after the United States was established. Within several decades after the Revolution, most states and territories allowed divorce, albeit under extremely limited circumstances, stipulated by public authority. Divorce grounds involved such breaches of the

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the state of California in 1948 when *Perez v. Sharp* was decided. Twelve years earlier, the Supreme Court had bypassed an opportunity to rule on marriage across the color line in 1955, *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749 (1955). Many scholars since have inferred that the justices thought the question was too inflammatory to treat immediately after *Brown v. Board of Education.* By 1964, however, in *McLaughlin v. Florida,* 379 U.S. 184, the court overruled *Pace v. Alabama,* 106 U.S. 583 (1883) on the "symmetrical" justification for race-based bans on non-marital sex. The opinion in *Loving* notes, p. 6 n. 5, that 16 states still prohibited and punished marriage on basis of racial classification - Ala, Art, Del, Fla, Ga., La., Miss, Mo, NC, Okl, SC, Tenn, Tex., W. Va. (Maryland repealed its law after the *Loving* case was initiated and before it was decided.)

marriage as adultery, desertion, or conviction of certain crimes. (Grounds such as cruelty were later added.)

Divorce began as and long remained an adversary proceeding, meaning that the petitioning spouse had to show that the other, the accused spouse, had broken the social and legal contract embodied in marriage as set by the state (*e.g.*, the husband had failed in his obligation to provide for his wife). When divorce was granted, the guilty party's fault was a fault against the state, as well as against his or her spouse. Many states' divorce laws prohibited remarriage for the guilty party in a divorce.

Initially, divorce was a matter for the legislature in some states but soon was standardized as a judicial proceeding. Early decisions on divorce petitions, and many early divorce statutes, were premised upon different and asymmetrical marital roles for husband and wife. For instance, desertion by either spouse was a ground for divorce, but failure to provide was a breach that only the husband could commit. In court, a wife seeking divorce had to show that she had been a model of obedience and service to her husband while the marriage lasted, in order to succeed in her petition.

Over time, divorce became more easily obtainable as state legislation expanded the grounds for it. This evolution was hotly contested, however, with many critics aghast at the notion of liberalized grounds for divorce, sure that it would undermine the marital compact entirely. The adversary form prevailed even while grounds were liberalized, leading, by the twentieth century, to cursory fact-finding hearings and even fraud upon the court by colluding spouses who both saw the marriage as having broken down.

In 1969, California enacted the nation's first complete no-fault divorce law, removing consideration of marital fault from the grounds for divorce, awards of spousal support, and division of property. The enactment of no-fault divorce was quickly embraced nationally as a

means of dealing honestly with marital breakdowns, achieving greater equality between men and women within marriage and advancing further the notion of consent and choice as to one's spouse. By 1985, all states had fallen into step, not always using the "no-fault" rubric but making it possible for a couple who found themselves incompatible to end their marriage.[16] This sweeping change reflected contemporary views that continuing consent to marriage was essential.

The liberalization of divorce that took place in the twentieth century vastly changed the institution of marriage as it had been known and experienced in the eighteenth and nineteenth centuries. Courts today still retain a strong role in the ending of marriages (since post-divorce terms of support must have court approval to be valid), but the move to no-fault divorce has reflected a major shift toward enabling the partners to a marriage to set their own marriage goals and to determine how well those goals are being met.

In divorce as in other aspects of family law today, gender neutrality in roles and decision-making is the premise. In the long past, obligations of the two spouses upon marital dissolution were gender-assigned and asymmetrical: the husband was responsible for the economic support of any dependent children, while courts gave the mother a strong preference for custody. Under current divorce laws, in contrast, both parents of dependent children have responsibility for economic support and for childrearing; gender neutrality is the judicial starting point for post-divorce arrangements. So too in alimony, as a result of a U.S. Supreme Court decision of 1979. *Orr v. Orr*, 440 U.S. 268 (1979). And with respect to government

[16] This was more than a national phenomenon, for over the same years (1965-85), most industrialized nations adopted some version of no-fault divorce. Critics since that time have blamed the no-fault arrangement for increasing the divorce rate, but their claims are unfounded when the divorce trend to date is examined. Although the American divorce rate per thousand people spiked initially in the 1970s, it hit a plateau in 1981 and has been declining for the last quarter century. As two economists have definitively shown, extrapolating from the rate at which divorce incidence rose during the century 1860-1960, the annual divorce rate in 2005 was approximately the same as it would have been in the absence of the no-fault system. Betsey Stevenson and Justin Wolfers, "Marriage and Divorce: Changes and Their Driving Forces," NBER Working Paper no. 12977, issued in March 2007 (see esp. Figure 1).

entitlements, by 1988 welfare reforms placed responsibility for children's support on both parents.

VII. MARRIAGE TODAY

Marriage has evolved into a civil institution through which the state formally recognizes and ennobles individuals' choices to enter into long-term, committed, intimate relationships. In California, as elsewhere, marital relationships are founded on the free choice of the parties and their continuing mutual consent to stay together.

California, along with other states, has eliminated gender-based rules relating to marriage in order to reflect contemporary views of gender equality and to provide fundamental fairness to both marriage partners. California marriage law treats men and women without regard to sex and sex-role stereotypes in marriage except in the requirement that men may only marry women and women may only marry men. This gender-specific requirement is an exception to the gender-neutral approach of contemporary marriage law and to the long-term direction of change in the institution of marriage toward equality and gender-neutrality in spouses' marital roles.

The institution of marriage has proved to be resilient rather than static during the course of American history. Some alterations in it have resulted from statutory responses to economic and social change, while other important changes in marriage have resulted from judicial recognition that state strictures must not infringe the fundamental right to marry. In the past half-century, U.S. Supreme Court decisions have confirmed that this basic civil right cannot be constrained by restrictions on marriage partner (*Loving v. Virginia*), by level of compliance with child support orders (*Zablocki v. Redhail*) or even by imprisonment (*Turner v. Safley*), and that marriage partners have a constitutional right to be treated equally regardless of gender within, or at the ending of, their marriage (*Orr v. Orr*).

While marriage rules have changed over the centuries, to the extent that features of marriage that once seemed essential and indispensable – including *coverture,* racial barriers to choice of partner, and state-delimited restrictions on divorce – have been eliminated, marriage today remains a vigorous institution. It has been strengthened, not diminished, by these changes, and persists as simultaneously a public institution closely tied to the public good and a private relationship that serves and protects the two people who enter into it.

The right to marry, and free choice of marriage partner, stand as profound exercises of the individual liberty central to the American polity and way of life. Legal allowance for couples of the same sex to marry would continue this tradition, as well as continuing the long history of adjustments in the legal requirements of marriage to preserve its contemporaneity and vitality. Enabling couples of the same sex to enjoy full rights to marriage choice would be consistent with this historical trend. That marriage remains a vital and relevant institution testifies to the law's ability to recognize the need for change, rather than adhere rigidly to values or practices of earlier times.

Dated: October 2, 2009

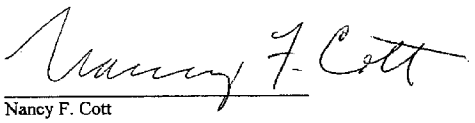

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EXHIBIT A

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EDUCATION:
Ph.D. 1974, in History of American Civilization, Brandeis University.
M.A. 1969, in History of American Civilization, Brandeis University.
B.A. 1967, magna cum laude in History, Cornell University.

TEACHING APPOINTMENTS:
Harvard University: Jonathan Trumbull Professor of American History, and Carl and Lily Pforzheimer Foundation Director of the Schlesinger Library, Radcliffe Institute for Advanced Study, 2002—

Yale University: Assistant Professor of History and American Studies, 1975-79; Associate Professor, 1979-86; Professor, 1986-90; Chair of Women's Studies Program, 1980-1987, 1992-93; Chair of American Studies Program, 1994-97; Stanley Woodward Professor of History and American Studies, 1990-2000; William Clyde DeVane Professor, spring 1998; Sterling Professor of History and American Studies, 2001.

Boston Public Library, NEH Learning Library Program, Lecturer, 1975.
Wellesley College: Instructor of History, parttime, 1973-74.
Clark University: Instructor of History, parttime, 1972.
Wheaton College: Instructor of History, parttime, 1971.

HONORS, FELLOWSHIPS AND GRANTS:
American Academy of Arts & Sciences elected member, 2008-
Centre d'etudes nord-americaines, Ecole des Hautes Etudes en Sciences Sociales, Paris: French-American Foundation Chair, 2003-04.
Fulbright Lectureship Grant (Japan-U.S. Educational Commission), July 2001.
Center for Advanced Study in the Behavioral Sciences, Stanford CA, 1998-99, 2008-09.
Radcliffe College Alumnae Association Graduate Society Medal, 1997.
Visiting Research Scholar, Schlesinger Library, Radcliffe College, 1991, 1997.
National Endowment for the Humanities Fellowship, 1993-94.
Liberal Arts Fellowship in Law, Harvard Law School, 1993-94, 1978-79,.
A. Whitney Griswold grant (Yale Univ.), 1984, 1987, 1988, 1991, 1993, 2000.
American Council of Learned Societies Grant-in-Aid, 1988.
Charles Warren Center Fellowship, Harvard University, 1985.
John Simon Guggenheim Memorial Foundation Fellowship, 1985.
Fellow, Whitney Humanities Center, Yale University, 1983-84, 1987.
Radcliffe Research Scholarship, Spring 1982.
Rockefeller Foundation Humanities Fellowship, 1978-79.
Phi Beta Kappa, 1966; Phi Kappa Phi, 1967.

PUBLICATIONS: BOOKS
Public Vows: A History of Marriage and the Nation (Harvard U. Press, 2000).
No Small Courage: A History of Women in the United States, editor (Oxford U. Press, 2000).

Root of Bitterness: Documents of the Social History of American Women, revised edition, coeditor with Jeanne Boydston, Ann Braude, Lori D. Ginzberg, and Molly Ladd-Taylor, Northeastern U. Press, 1996)
A Woman Making History: Mary Ritter Beard Through Her Letters (Yale U. Press, 1991).
The Grounding of Modern Feminism (Yale U. Press., 1987).
A Heritage of Her Own: Towards a New Social History of American Women, coeditor with E. H. Pleck (Simon & Schuster, 1979).
The Bonds of Womanhood: 'Woman's Sphere' in New England, 1780-1835 (Yale U. Press, 1977; 2d ed. with new preface, 1997).
Root of Bitterness: Documents of the Social History of American Women (E.P.Dutton, 1972)

PUBLICATIONS: ARTICLES

"The Public Stake," in Just Marriage, Mary Lynn Shanley et al., (NY, Oxford U Press, 2004), 3336.
"Public Emblem, Private Realm: Family and Polity in the United States," in Democratic Vistas, ed. Anthony Kronman, (New Haven, Yale U. Press, 2004).
"Women's Rights Talk," American Studies in Scandanavia 32:2 (2000), 18-29.
"Marriage and Women's Citizenship in the United States, 1830-1934," American Historical Review 103:5 (Dec. 1998), 1440-74.
"Justice for All? Marriage and Deprivation of Citizenship in the United States," in Justice and Injustice, Amherst Series in Law, Jurisprudence & Social Thought, ed. Austin Sarat (Ann Arbor, U. Mich, 1996).
"'Giving Character to Our Whole Civil Polity': Marriage and State Authority in the Late Nineteenth Century," in U.S. History as Women's History ed. Linda Kerber et al. (Chapel Hill, U.N.C., 1995).
"Early Twentieth-Century Feminism in Political Context: A Comparative Look at Germany and the United States," in Suffrage & Beyond, ed. Caroline Daley and Melanie Nolan (Auckland, NZ, Auckland U.P., 1994).
"The Modern Woman of the 1920s, American Style," in La Storia Delle Donne, vol. V, Francoise Thebaud, ed., G. Laterza & Figli (Italy), 1992 (also French, Dutch, Spanish and U.S. editions).
"Two Beards: Coauthorship and the Concept of Civilization," American Quarterly, 42:2 (June 1990).
"Historical Perspectives: The Equal Rights Amendment in the 1920s," in Conflicts in Feminism, ed. Marianne Hirsch and Evelyn Fox Keller (N.Y., Routledge, 1990).
"On Men's History and Women's History," in Meanings for Manhood: Constructions of Masculinity in Victorian America, ed. Mark Carnes and Clyde Griffen (Chicago, U. Chicago Press, 1990).
"Across the Great Divide: Women's Politics Before and After 1920," in Women, Politics, and Change, ed. Louise Tilly and Patricia Gurin (N.Y., Russell Sage Foundation, 1990); revised and reprinted in One Woman, One Vote: Rediscovering the Woman Suffrage Movement ed. M. Wheeler (NewSage, 1995).
"What's in a Name? The Limits of Social Feminism or, Expanding the Vocabulary of Women's History," Journal of American History, 76:3 (December 1989).
"The South and the Nation in the History of Women's Rights," in A New Perspective: Southern Women's Cultural History from the Civil War to Civil Rights ed. Priscilla C. Little and Robert C. Vaughan (Virginia Foundation for the Humanities, Charlottesville, 1989).
"Beyond Roles, Beyond Spheres: Thinking about Gender in the Early Republic," with Linda Kerber et al., William and Mary Q., 3d ser., 46 (July 1989).
"Women's Rights: Unspeakable Issues in the Constitution," The Yale Review, 77:3 (Spring 1988), 382-96.
"Feminist Theory and Feminist Movements: The Past Before Us," in What is Feminism? ed. Juliet Mitchell and Ann Oakley (Oxford, Basil Blackwell, 1986, and N.Y., Pantheon, 1986).
"Feminist Politics in the 1920s: The National Woman's Party," Journal of American History 71 (June 1984).
"Passionlessness: An Interpretation of Anglo-American Sexual Ideology, 1790-1840," Signs: A Journal of Women in Culture and Society, 4 (1978).
"Notes Toward an Interpretation of Antebellum Childrearing," The Psychohistory Review 6 (Spring 1978).
"Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records," Journal of

Social History, 10 (Fall 1976).
"Divorce and the Changing Status of Women in 18thCentury Massachusetts," William and Mary Quarterly, 3rd ser., 33 (October 1976).
"Young Women in the Second Great Awakening in New England," Feminist Studies, 3 (Fall 1975).

PUBLICATIONS: MISCELLANY

"Introduction," Feminists Who Changed America, 1963-75, ed. Barbara Love (U. of Illinois Press, 2006).
"Afterword," Haunted by Empire: Geographies of Intimacy in North Americaed. Ann Laura Stoler, (Duke Univ. Press, 2006).
"Janet Flanner," in Notable American Women: Completing the Twentieth Century(Cambridge, Harvard Univ. Press, 2005).
Co-editor with Drew Gilpin Faust, The Magazine of History special issue on Gender History, March 2004.
"Considering the State of U.S. Women's History," with others, Journal of Women's History 15:1 (2003).
"Response," to "Books in Review: *Public Vows: A History of Marriage and the Nation*," The Good Society, 11:3 (2002), 88-90.
"The Great Demand," in Days of Destiny, ed. James MacPherson and Alan Brinkley, Society of American Historians (Agincourt Press, 2001).
Introduction to Jane Levey's "Imagining the Postwar Family," Journal of Women's History, Fall 2001.
"Mary Ritter Beard," in American National Biography (Oxford U. Press, 1999).
"Challenging Boundaries: Introductory Remarks," Yale Journal of Law and Feminism 9 (1997).
"A Conversation with Eric Foner," culturefront 4:3 (Winter 1995-96).
"Bonnie and Clyde," in Past Imperfect: History and the Movies, ed. Mark Carnes (N.Y., Henry Holt, 1995).
"Privacy"; "Domesticity"; "Mary Ritter Beard"; in A Companion to American Thought, ed. Richard Wightman Fox and James Kloppenberg (Cambridge, Basil Blackwell, 1995).
"Charles A. Beard and Mary Ritter Beard," The Reader's Companion to American History, ed. Eric Foner and John Garraty, 1991.
"Comment on Karen Offen's 'Defining Feminism: A Comparative Historical Approach,' Signs: Journal of Women in Culture and Society, 15:11 (1989).
Editorial, Special issue of Women's Studies Quarterly, XVI:1/2 Spring/(Summer 1988), "Teaching the New Women's History."
Introduction to A New England Girlhood by Lucy Larcom (Boston, Northeastern U. Press, 1985).
"Women as Law Clerks: Memoir of Catherine G. Waugh," in The Female Autograph, New York Literary Forum, 12-13 (1984).
Afterword to Sarah Eisenstein, Bread and Roses, ed. Harold Benenson (London, RKP, 1983).
"Mary Ritter Beard," in Notable American Women: The Modern Period (1980).

PUBLICATIONS: REVIEW ESSAYS

"Adversarial Invention," American Quarterly, 47:2 (June 1995).
"Patriarchy in America is Different," American Bar Foundation Research Journal 1987:4 (Fall 1987).
"Women and the Ballot," Reviews in American History, 15:2 (June 1987).
"The House of Feminism," New York Review of Books, 30 (March 17, 1983).
"The Confederate Elite in Crisis: A Woman's View," The Yale Review, 71 (Autumn 1981).
"Liberation Movements in Two Eras," American Quarterly, 32 (Spring 1980).
"Abortion, Birth Control, and Public Policy," The Yale Review, 67 (Summer 1978).

PUBLICATIONS: REVIEWS

in American Historical Review, American Prospect, Boston Globe, Business History Review, Intellectual History Newsletter, International Labor and Workingclass History, Journal of American History, Journal of Interdisciplinary History, New Mexico Historical Review, New York Times Book Review, Pacific

Studies, Signs: A Journal of Women in Culture and Society The Times Literary Supplement Women's History Review, and The Yale Review.

PUBLICATIONS: EDITORIAL PROJECTS

General editor, The Young Oxford History of Women in the United States 11 volumes, Oxford University Press, 1994.

Editor, History of Women in the United States,20 volumes (article reprint series), K.G. Saur Publishing Co., 1993-94.

Guest Editor, special issue ofWomen's Studies Quarterly XVI:1/2 (Spring/Summer 1988), on "Teaching the New Women's History."

OTHER PROFESSIONAL ACTIVITIES:

GRANT PROJECTS:

Dissertation seminar in gender history for graduatestudeuts, Mellon Foundation, 2002.

Steering Committee, Ford Foundation Project on Women and Gender in the Curriculum in Newly-Coeducational Institutions, 1985-90.

Principal Investigator, National Endowment for the Humanities Implementation Grant, "Strengthening Women's Studies at Yale," 1983-86.

Principal investigator, National Endowment for the Humanities Pilot Grant to Women's Studies, Yale University, 1981.

ACADEMIC JOURNALS AND REFERENCE WORKS:

American National Biography, senior editor, 1989-98.
American Quarterly, editorial board, 1977-1980.
Feminist Studies, associate editor, 1977-85, editorial consultant, 1985-97.
Gender and History, advisory board, 1987-92; editorial collective, 1993-96.
Journal of American History editorial board, 1996-99.
Journal of Social History, editorial board, 1978-.
Journal of Women's History, editorial board, 1987-98.
Notable American Women, volume 5, advisory board, 1999-04.
Orim: A Jewish Journal at Yale, editorial board, 1984-88.
The Readers' Encyclopedia of American History, advisory board, 1989-91.
Reviews in American History, editorial board, 1981-85.
Women's Studies Quarterly, editorial board, 1981-94.
Yale Journal of Law and the Humanities, advisory board, 1988-2001.
The Yale Review, editorial board, 1980-88, 1991-99.

SERVICE IN PROFESSIONAL ORGANIZATIONS:

American Historical Assocation, delegate to American Council of Learned Societies, 2008-12
Society of American Historians, Executive Board, 2006-
Elected member: American Antiquarian Society, Massachusetts Historical Society, Society of American Historians.
Organization of American Historians:Merle Curti Prize Committee, 2008;Binkley-Stephenson Prize Committee, 1987-1990 (chair, 1988); elected member of Nominating Committee, 1993-95 (Chair, 1994-95); elected member of Executive Board, 1997-2000; OAH Lecturer, 1997--.
Berkshire Conference of Women Historians: Co-Chair, Eighth Berkshire Conference on the History of Women (1990).
American Studies Association: Nominating Committee, 1981-84; National Council, 1987-90; American Quarterly Review Committee, 1989.

ACADEMIC ADVISORY BOARDS:

The Museum of Women/The Leadership Center, N.Y. State, (chair of historians' advisory board) 2000-.
Princeton University Program in Women's Studies, 1985-2001.
Project on Gender in Context, Mt. Holyoke College, 1982-83.
The Correspondence of Lydia Maria Child, 1977-80.
Schlesinger Library on the History of Women, Radcliffe College, 1977-80.

AUDIOVISUAL MEDIA PROJECTS:

Advisory Board, 888 Film Project, "Left on Pearl," 2006-.
Advisory Board, Women 2.0 Summit, 2007.
Advisory Board, Blueberry Hill Productions Ten Stories Project, 2005-
WGBH documentary proposal on the History of Marriage in America, Principal Consultant, 2002.
Institute on the Arts and Civic Dialogue, Affiliated Scholar, American Repertory Theatre and W.E.B. DuBois Institute, summer 1999.
Margaret Sanger film project (by Bruce Alfred), Consultant, 1994--96,
"One Woman, One Vote: The Struggle for Woman Suffrage in the U. S.," Advisory Board, Educational Film Center, 1991-95.
"The American Experience," Advisory Board, WBGH-TV, Boston, MA, 1986--90.
Consultant, "Mary Silliman's War," film by Steven Schechter, 1987.
Consultant, "Lowell Fever," film by Made in U.S.A., Inc.1985-87.
"Legacies: Family History in Sound," radio course on the history of women and the family in the U.S., Advisory Board, 1984-86.
Connecticut Public Radio series, "Choices"/Everyday History, Radio Programs for Children 8 to 12," Consultant, 1982-83.
Dan Klugherz (Film) Productions, N.Y., Consultant, 1981-82.
Stanton Project on Films on Women in American History, Advisory Board, 1974-77.

PRIZE AND FELLOWSHIP SELECTION COMMITTEES:

Merle Curti Prize, Organization of American Historians, 2008.
Mark Lynton History Book Prize, 2002.
Bunting Institute Fellowship Program, Radcliffe College, 1982, 1996.
American Antiquarian Society Fellowships, 1991, 1992, 1994.
Governors' Prize, Yale University Press, 1990.
American Council of Learned Societies, Fellowships for Recent Recipients of the Ph.D., 1987, 1988, 1990.
Bancroft Prize (Columbia University), 1985.
Radcliffe Research Scholars Program, 1982.
Hamilton Prize, Women and Culture Series, U. Michigan Press, 1981.

CONSULTANT/EVALUATOR (selected list):

University of Helsinki, city center campus, 2005.
Univ. of California at Santa Barbara, Women's Studies Program, February 2002.
National Endowment for the Humanities, fellowships for university teachers, 1998; media projects, 2001.
History Department, University of Oregon, 1999.
Woodrow Wilson Center Fellowships, 1991, 1992, 1994.
State of Colorado Commission on Higher Education, 1990.
National Humanities Center Fellowships, 1988, 1989, 1991, 1992, 1994.
"Foundations of American Citizenship," curriculum project, Council of Chief State School Officers, 1987.
Connecticut Humanities Council, 1986.

Rockefeller Foundation Gender Roles Fellowships Program, 1985.
Radcliffe Research Scholars, 1983.
Working Women's History Project, 9 to 5, Organization for Women Office Workers, 1981.
Rockefeller Foundation Humanities Fellowships, 1980.

ACADEMIC LECTURES, PAPERS, COMMENTS DELIVERED (selected list):

Panelist, "State of the Field: History of Women/Gender/Sexuality,"Organization of American Historians annual meeting, April 2010.
Panelist, "Marriage on Trial: Historians and Lawyers in Same-Sex Marriage Cases," Amer. Historical Assoc. annual meeting, Jan. 2010.
"Born Modern," Center for Advanced Study inthe Behavioral Sciences, Stanford University, October 2008.
"Revisiting the Jazz Age," John O'Sullivan Memorial Lecture, Florida Atlantic U, November, 2007.
"Recovering the Interwar Generation," Modern America Workshop, Princeton University, April 2007; University of Chicago Social History Workshop, May 2007.
"The Reproduction of Gender," graduate student conference onNineteenth-Century Reproduction,Temple University, February 2007.
"Women in the Rubble," Newcombe Institute Summit on EducatingWomen for a World in Crisis,New Orleans, LA, February 2007.
"Marriage and Citizenship in the History of the United States,"Hall Center for the Humanities, University of Kansas, November 2006.
"Women of Happenstance," First Ladies Conference, McKinley Homestead, Canton, OH, Apr 2006.
"Revisiting the 1920s Generation," Rothermere American Institute, Oxford Univ., January 2006.
"Boundaries and Blinders in History: Revisiting the 1920s Generation," keynote address, Western Association of Women Historians annual meeting, Phoenix, AZ, April 2005.
Panelist, "The Political Spectrum of Same-Sex Marriage," conference on Breaking with Tradition: New Frontiers for Same-Sex Marriage, Yale Law School, March 2005.
"Gender History and Generations," Women's History Month address, Rutgers-Camden Law School, Camden NJ, March 2005.
"Collecting Women's History at the Schlesinger Library," Society of American Archivists annual meeting, August 2004.
Colloquium on George Chauncey's Gay New York, Dec. 2003, Ecole Normale Superieur, Paris.
Closing Remarks, Library of Congress symposium, "Resourceful Women," June 19-20, 2003.
"Women, Men, and Modern Marriage," Ecole des Hautes Etudes en Sciences Sociales, November 2003.
"What's Love Got to Do with It? Marriage as a Public Institution in the United States," Fairleigh Dickinson University, March, 2003.
Comment, "Revisiting Domesticity: Symbolic Economies of Sex and Gender," American Historical Assoc. annual meeting, Washington, D.C., January 2003.
"Gendering Colonial America, Making Women's History Colonial: A Roundtable," Berkshire Conference on Women's History, Storrs, CT, June 2002.
Comment, panel on "Race and Family in Wartime America: Illegitimacy, Immigration, and the Church," Organization of Amer. Hist annual meeting, Washington, D.C. April 2002.
"New Directions in Women's History after 9/11," Brandeis University, March 2002.
"The Efficacy of Women's History," Bridgewater State University, March 2002.
"Marriage and the Nation," Harvard Law School LegalHistory Forum, October 2001.
"The Family, Citizenship, and Democracy in the United States," University of Tokyo, Japan, July 2001.
"Women as Workers, Citizens, and Activists in the Mid-Twentieth-Century U. S." four- seminar series, Ritsumeikan University, Kyoto, Japan, July 2001.
"Grooming Citizens: Marriage in the Political History of the United States," Kyoto American Studies Seminar, Kyoto, Japan, July 2001.

"Public Sanctity for a Private Realm: The Family, the Rhetoric of Democracy, and Constitutional Values in the U.S.," Bacon Lecture on the Constitution, Boston Univ., May 2001.
"Democracy and the Family," Yale Tercentennial Series "Democratic Vistas," April 2001.
"Marriage and the Nation: Historical Perspectives," Northeastern University Feminist Studies Colloquium, March 2001.
"Public Vows: On Marriage and the Nation in the Early Twentieth-Century U.S.," Center for Historical Study, U. Maryland, College Park, October 2000.
"Marriage Revised and Revived," Associated Yale Alumni faculty lecture, May, 2000.
Comment, session on "The Idea of Marriage: The British Atlantic Context," International Seminar on the History of the Atlantic World, 1500-1800, Harvard Univ., August 2000.
"Reflections on Women and/in Authority," Women, Justice, and Authority: A Working Conference, Yale Law School, April 28, 2000.
"Grooming Citizens: Marriage and the Civic Order in the United States," In the Company of Scholars Lecture Series, Yale University Graduate School, April 2000.
"Public Vows: Marriage as a Public Institution," History Department, Stanford University, January 2000.
"An Archaeology of American Monogamy," History Department, Northwestern Univ., October 1999.
"The Modern Architecture of Marriage," Gender and Policy Workshop, Department of Economic History, Stockholm University, Stockholm, Sweden, October 1999.
"Women's Rights Talk," conference on "Rights-Civil, Human, and Natural," University of Southern Denmark, Odense, Denmark, October 1999.
Comment, "Making and Breaking Marriages: Reconsidering American Families through the Law, Berkshire Conference on the History of Women, June 1999.
"Marriage Fraud in the Making of Immigration Restriction in the U.S." Center for Cultural Studies, Univ. of California, Santa Cruz, May 1999.
Panel discussant, women and citizenship, Univ. of California, Berkeley, October 1998.
"An Approach to Citizenship through Gender History," Univ. of Colorado at Colorado Springs, Feb. 1999.
"Marriage and Citizenship," Legal Theory Workshop, Yale Law School, October 1998.
Comment, "Public Policy and Marriage," American Society for Legal History, Seattle, WA, Oct. 1998.
"Thinking about Citizenship and Nationality through Women's History," keynote address, Australian Historical Association, Sydney, Australia, July 1998.
"Race, Blood, and Citizenship: A Gendered Perspective on U.S. Immigration Restriction, 1895-1917," International Federation for Research in Women's History conference, Melbourne, Australia, June 1998.
Introduction, Conference on Sexual Harassment Law, Yale Law School, February 1998.
"Marriage and Public Policy: The Politicization of Marriage in the 1850s," Schlesinger Library, Radcliffe College, May 1997.
Comment, "Association-Building in America," Organization of American Historians annual meeting, San Francisco, April 1997.
"Writing American Women's History: Retrospect on Nineteenth Century Domesticity," Clarion University, Clarion, Pa., April 1997.
"Against Equality: Mary Ritter Beard and Feminism," DePauw University, March 1997.
"Marriage and Women's Citizenship: A Historical Excursion," N.Y.U. Law School, March 1997.
Discussant, "One Woman, One Vote: Painting a 70-year Battle on a 2-hour TV Canvas," Berkshire Conference on the History of Women, June 1996, U.N.C.
Chair, "International Feminism, 1840-1945," American Historical Association annual meeting, January 1996, Atlanta, Ga.
"The Gender of Citizenship and the 19th Amendment," keynote address, University of Texas 8th Biennial Graduate Student Historical Symposium, Austin, Oct. 1995; Women's History Week lecture, Fitchburg State College, Fitchburg Mass., March 1996.
"Effects of the 19th Amendment," Delaware Heritage Commission Conference on the 75th Anniversary of the 19th Amendment, Delaware State Univ., November, 1995.

"Forming the Body Politic: Gender, Race, and Citizenship Traditions in the U.S., "John Dewey Lecture in the Philosophy of Law, Harvard Law School, October 1994; Jane Ruby Humanities Fund Lecture, Wheaton College, March 1995.

"The Marriage Knot: Gender, Race and Citizenship Policy in the U.S., 18551934," UCLA Center for the Study of Women, October 1994.

Chair and comment, "Debating Democracy in the 19th Century," annual meeting of the Organization of American Historians, Atlanta,GA, April 1994.

"Justice for All? Marriage, Race, and Deprivation of Citizenship in the Early 20thCentury U.S.," Keck Lecture, Amherst College, February 1994; Harvard University, February 1994.

"Marriage, Gender, and Public Order," Symposium of theAssociation for Women's History, Amsterdam, Holland, November 1993.

"Early Education of Women," symposium on Uncovering Women's History in Museums and Archives, Litchfield (CT) Historical Society, October 1993.

"Early 20th-century Feminism in Germanyand the U.S. Compared," Suffrage Centenary Conference, Wellington, New Zealand, August 1993.

"Reviewing the Private and the Public through Women's History," Conference for 20 Years of the Edith Kreeger Wolf Distinguished Visiting Professorship, Northwestern Univ., April 1993.

"Marriage as/and Public Policy in the Late NineteenthCentury U.S.," annual meeting of the Organization of American Historians, Anaheim, CA, ; Northwestern UniversityHistory Department, April 1993.

"Against Equality: Mary Ritter Beard and Feminism," Conference on the 200th Anniversary of Wollstonecraft's Vindication of the Rights of Women, Sussex, England, Dec. 1992.

"'Enlightenment Respecting Half the Human Race': Mary Ritter Beard and Women's History," Sophia Smith Collection Semi-Centennial, September 1992.

"Women's History in Contemporary Perspective," Harvard University Women's HistoryWeek, Mar 1992.

"Educating Women in the U.S.," Founders Day lecture, Mary Baldwin College, October 1991.

"Feminism in the U.S. in theEarly 20th Century in Comparative Perspective," German Association for American Studies annual conference, Muenster, Germany, May 1991.

Comment, "Women and American Political Identity," conference on Political Identity in American Thought, Yale Univ., April 1991.

"Slavery, Race, and the History of Women's Rights in the U.S.," Trenton State College, NJ, March 1991.

Comment, "Contextualizing Feminism," annual meeting of the American Historical Association, New York City, December 1990.

"The Political Isn't Personal: Mary Ritter Beard's View of Women's History," Center for American Culture Studies, Columbia U., October 1990.

"Mary Ritter Beard and Women's History," N.Y. Public Library, Sept. 1989.

Chair, "Power in the Early Twentieth Century," Organization of American Historiansannual meeting, St. Louis, April 1989.

"What's in a Name?: The Limits of Social Feminism," Boston U., Jan1989; Brandeis U., Sept. 1989.

Panelist, "Feminist Theory," 10th Anniversary Celebration of the Women's Studies Program at Brandeis U., November 1988.

"Reconsidering Individualism and 'Nature Herself' in the Era of Laissez-Faire Constitutionalism," Harvard U. History Department, April 1988.

Panelist, "Individualism," N. Y. U. Humanities Center, March 1988.

Afterword, "Masculinity in Victorian America," Barnard College, Columbia U., January 1988.

Panelist, "Beyond Roles, Beyond Spheres: Thinking about Gender in the Early Republic," U. of Pennsylvania, December 1987.

Chair, "Women in American Constitutional History at the Bicentennial," Annual Meeting of the American Hist. Assoc., Washington, D.C., December 1987.

"Women's Rights: Unspeakable Issues in the Constitution," Association of Yale Alumni Faculty Seminar, September 1987, New Haven, CT; Brandeis U.,March 1988; Second Annual Lowell Conference on

Women's History, Lowell, MA, March 1988; Conference on the Constitution as Historical and Living Document, Duchess County Community College, April 1988; Richardson American Studies Lecture, Georgetown U., April 1988.

"How Weird Was Beard? Mary Ritter Beard and American Feminism," Seventh Berkshire Conference on the History of Women, June 1987, Wellesley MA.

"The Birth of Feminism," Women's Studies Program, Cornell U., March 1987.

"Feminism and Women's Political Participation in the Early 20th Century," Conference on Women and Citizenship, Women Historians of the Midwest, St. Paul, MN, March 1987.

"The Power of Communalism: Reflections through Women's History," Historic Communal Societies Conference, October 1986.

Chair, "Women in the 1950s: An Interdisciplinary Exploration," Organization of American Historians annual meeting, N.Y., April 1986.

"Feminism in the 1920s," Boston Area Feminist Colloquium, Northeastern U., January 1986.

"History of Feminism," Institute for Policy Studies, Washington, D.C., May 1985.

"Feminist Theory and Feminist Movements: The Past Before Us," Woman's History Week, Harvard U., March 1985.

"Problems of Feminism in the 1920s: the Political Environment," Women's History Series, New York U., February 1985; American Studies Lecture, Smith College, March 1985; Harvard Law School Faculty Colloquium, May 1985.

"Has Modern Woman Disrupted the Home? 1920s Answers," Wesleyan Center for the Humanities, October 1984.

"Feminism and Women in Professional Occupations in the 1920s," American Studies lecture, Amherst College, February 1984.

"Feminism in Transition, 1910-1930," Sixth Berkshire Conference on the History of Women, June 1984, Northampton, MA.

Comment, "Nineteenth-Century Gender Conventions," Smith-Smithsonian Conference on Conventions of Gender, February 1984.

"Definitions of Feminism in the Early Twentieth-Century United States," Whitney Humanities Center, Yale U., September 1983.

"Challenging Myths of Victorian Womanhood," American Psychiatric Association Convention, New York City, May 1983.

"Women's History and Feminism," Phi Beta Kappa Lecture, Sweet Briar College, February 1983; Sarah Lawrence College, March 1983.

"Reappraising the History of Feminism in the 1920s," American Studies Series, Boston College, February 1983; History Dept. Series, U. of Virginia, February 1983; Hamilton College, April 1983; Trinity College, April 1983.

"The Hundred Fragments: Feminism, the Woman Suffrage Coalition, and American Society," Whitney Humanities Center, Yale U., January 1983; History Colloquium Series, Princeton U., March 1984.

"Women's Education Before 1837," panel, Conference on Women and Education: The Last 150 Years, Mt. Holyoke College, April 1982.

"The Crisis in Feminism, 1910-1920," Radcliffe Research Scholars Series, Radcliffe College, May 1982; Women's Studies Series, Wesleyan U., October 1982.

"Feminism and Women's History," Harvard U., Women's History Week, March 1982.

"The Problem of Feminism in the 1920s," Isabel McCaffrey Lecture, May 1981, Harvard U.; American Civilization Dept., Brown U., November 1981; History and Women's Studies Series, U. of Michigan, March 1982; Center for European Studies, Harvard U., April 1982.

Comment, "Consciousness and Society in New England, 1740-1840," Organization of American Historians annual meeting, April 1980, San Francisco, CA.

"Women's History: Retrospect and Prospect," Harvard Divinity School History Colloquim, March 1980; U. of South Florida Women's Week, March 1980; American Assoc. for State and Local History, NE

Regional Seminar, November 1980, New Haven, CT.
"Women and Feminism in the 20th Century," Bunting Institute, Radcliffe College, October 1978
"Roundtable on Mary Ritter Beard," Fourth Berkshire Conference on the History of Women, August 1978, South Hadley, MA.
"Ministers and Women in the Late 18th and Early 19th Century," Princeton Theological Seminary, March 1978.
1978.
"New England Women's Work in the Early National Period," Historic Deerfield, MA, February 1978.
Comment, "Sexuality and Ideology in 19th-century America," Southern Hist. Assoc. Conference, November 1977, New Orleans, LA.
"Passionlessness: An Interpretation of Anglo-American Sexual Ideology, 1790-1840," History Dept. Colloquium, U. of Mass., April 1977; Rutgers U., March 1978; Marjorie Harris Weiss Lectureship, Brown U., March 1978.
"Women and Religion in Early 19th-Century New England," History Department Colloquium Series, U. of Conn., February 1977; Old Sturbridge Village, March 1977.
Chair and comment, "Comparative Perspectives on Sexual and Marital Deviance and the Law," Third Berkshire Conference on the History of Women, June 1978, Bryn Mawr, PA.
"Adultery, Divorce, and the Status of Women in Revolutionary Massachusetts, "Conference on Women in the Era of the American Revolution, July, 1975, Washington, D.C.; Princeton U. Colloquium Series, November 1975; Boston State College Lecture Series on the American Revolution, November 1976.
Young Women's Conversion in the Second Great Awakening," Second Berkshire Conference on the History of Women, November 1974, Cambridge, MA.
Chair and comment, "Women in the Professions," First Berkshire Conference on the History of Women, March 1973, New Brunswick, N.J.

PUBLIC SERVICE LECTURES:

"What is Gender History?" Symposium on Women, History Connections Teaching American History Grant, Rockford Public Schools, Rockford, Illinois, October 2007.
"Marriage and the State," Thursday Morning Club (for the benefit of Mt. Auburn Hospital), Feb 2006.
"What Can Venturesome Women of the 1920s Tell Us Today?" Linda Rosenzweig Memorial Lecture, Wellfleet Public Library, Wellfleet MA, August 2005.
"Marriage and the Public Order in the History of the United States," 2005 American Studies Summer Institute, John F. Kennedy Library, July 2005.
"Preserving Women's History at Radcliffe and Harvard," Committee on the Concerns of Women at Harvard, June 2005.
"Women's Education in the 18th Century," Adams Historic Site, Quincy, MA, April, 2005.
Moderator, "What Sort of a Right is Marriage?" Harvard University Human Rights Program, March 2005.
"What is Gender History?" annual luncheon for the College Board/Organization of American Historians, annual meeting, San Jose, CA, April 2005.
"What the State Has to Do with It: Changing Marriage," Democrats Abroad, Paris, Dec. 2003.
"Marriage and the Law," invited discussion with Senior Matrimonial Lawyers, educational retreat, Troutbeck Conference Center, Amenia NY, October 2003.
"Marriage as a Public Institution in the United States," Harvard Neighbors, February 2003; Harvard Librarians' group, February 2003.
"Looking at the World after 9/11 through a Women's History Lens," Radcliffe Seminars Final Conference, April 2002.
"Women as Workers and Citizens in the Twentieth Century," Institute for Emerging Civil Rights Leaders, Harvard Graduate School of Education, June 11, 2001.
"The Value of Women's Work: Historical, Public and Private Views," Bostonian Society, May 2001.
"Woman Suffrage: Why Did It Take So Long?" and "The Gender Structure of Citizenship," NEH

Summer Institute for High School and Middle School Teachers on Women's Rights and Citizenship in American Thought," Ohio State Univ., July 2000.

"Education in Abigail Adams' Time," Women and the American Revolution Lecture Series, Adams National Historical Site, Quincy, MA, June 2000.

"Women of Conscience in Politics," Maine Town Meeting, 50th anniversary of Sen. Margaret Chase Smith's Declaration of Conscience, June 1, 2000, Skowhegan, Maine.

"The History of Marriage," testimony and discussion before the Judiciary Committee, Vermont House of Representatives, January 2000.

"Women as Citizens in the 20th Century," A Millennium Evening at the White House, Washington, D.C., March 1999.

"Historians and Filmmakers: A Dialogue," Chatauqua .N.Y., August 1997.

"Winning the Women's Ballot: Citizenship, World War, and the Woman Suffrage Campaign," U.S. Air Force Academy, Colorado Springs, August 1995.

"The Beginnings of Women's Education in the U.S.," Witmer Lecture, Social Studies Dept., Hunter College High School, March 1995.

"New Immigrants, New Women," Rebecca Plank Memorial Lecture, Milton Academy, March 1995.

"The South and the Nation in the History of Women's Rights," Conference of Southern Humanities Foundations, Washington, D.C., May 1988.

"Women's Rights: Unspeakable Issues in the Constitution," Judicial Seminar, N.Y. State Judiciary Continuing Education, July 1988.

EXHIBIT B

Exhibit B – Sources
Expert Report of Nancy F. Cott

Bank, Steven A., "Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in Civil Rights Act of 1875," University of Chicago Law School Roundtable, 2:1 (1995), 303-344.

Basch, Norma, Framing American Divorce (Berkeley, Univ. of California Press, 1999).

Basch, Norma, In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York (Ithaca, Cornell U.P., 1982).

Bishop, Joel Prentiss, Commentaries on the Law of Marriage and Divorce, vol. 1, 4th edition p. 2 (Boston: Little, Brown, 1864).

Boller, Paul F. Jr., Presidential Inaugurations p. 4 (New York: Harcourt, 2001).

Bredbenner, Candice A Nationality of Her Own: Women, Marriage and the Law of Citizenship (Berkeley, U. Call. Pr, 1998).

Burnham, Margaret. "An Impossible Marriage: Slave Law and Family Law," Law and Inequality, 5 (1987), 187-225.

Cott, Nancy F. "Marriage and Women's Citizenship in the United States, 1830-1934," American Historical Review 103:5 (Dec. 1998), 1440-74.

Cott, Nancy F. Public Vows: A History of Marriage and the Nation (Cambridge, Harvard Univ. Press, 2000).

Edwards, Laura F. "'The Marriage Covenant is at the Foundation of all Our Rights': The Politics of Slave Marriages in North Carolina after Emancipation," Law and History Review 14:1 (Spring 1996), 81-124.

Fowler, David H. Northern Attitudes towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780-1930 (NY and London, Garland, 1987)

Franke, Katherine M., "Becoming a Citizen: Reconstruction Era Regulation of African-American Marriages," 11 Yale Journal of Law and Humanities (1999) 251-309.

Gettys, Luella, The Law of Citizenship in the United States (Chicago: Univ of Chicago Press, 1934).

Glendon, Mary Ann. The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (Chicago, U. Chicago P., 1989).

Grossberg, Michael. Governing the Hearth:Law and the Family in Nineteenth-Century America (Chapel Hill, U.N.C. Pr., 1985).

Hartog, Hendrik. "Marital Exits and Marital Expectations in Nineteenth Century America," Georgetown Law Journal, 80:1 (October 1991), 95-129.

Hasday, Jill Elaine, "Federalism and the Family Reconstructed," UCLA Law Review 45:5 (June 1998), 1297-1400.

Hing, Bill Ong. Making and Remaking Asian America through Immigration Policy, 1850-1990 (Stanford, Stanford Univ. Press, 1993).

Hodes, Martha. White Women, Black Men: Illicit Sex in the Nineteenth-Century South (New Haven, Yale University Press, 1997.

Hover, Ernest J. "Citizenship of Women in the United States," American Journal of International Law, 26 (1932), 703-40.

Kessler-Harris, Alice In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-century America (N.Y.., Oxford, 2001).

McCloskey, Robert G., ed. The Works of James Wilson (Cambridge, Harvard Univ. Press, 1976), 2 vols. pp. 600-01.

McCurry, Stephanie. Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country (NY, Oxford, 1995).

Osumi, Megumi Dick, "Asians and California's Anti-Miscegenation Laws," in Nobuya Tsuchida, ed. Asian and Pacific American Experiences: Women's Perspectives (Minneapolis, Asian/Pacific American Learning Resource Center and Univ of Minnesota, 1982), 1-37.

Pascoe, Peggy. What Comes Naturally: Miscegenation law and the Making of Race in America (N.Y. Oxford, 1999).

Phillips, Roderick, Putting Asunder: A History of Divorce in Western Society (Cambridge and New York, Cambridge U.P., 1988).

Ryan, Rebecca M., "The Sex Right: A Legal History of the Marital Rape Exemption," Law and Social Inquiry 20:4 (1995).

Sapiro, Virginia. "Women, Citizenship and Nationality: Immigration and Naturalization Policies in the United States," Politics and Society 13:1 (1984), 1-26.

Sayre, Paul, "A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services," Virginia Law Review 29 (1943), 857-75.

Shammas, Carole. "Re-assessing the Married Women's Property Acts," Journal of Women's History, 6:1 (Spring 1994), 9-30.

Stevenson, Betsey and Justin Wolfers, "Marriage and Divorce: Changes and Their Driving Forces," NBER Working Paper no. 12977, March 2007.

Sugarman, Stephen D., and Herma Hill Kay, eds. Divorce Reform at the Crossroads (New Haven, Yale UP, 1990).

Vernier, Chester G. American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States . . . (Stanford, Stanford U.P., 1931). vol I Introductory Survey and Marriage (to Jan. 1 1931); vol III, Husband and Wife (to Jan. 1, 1935), p. 195.

Wallenstein, Peter, "Race, Marriage and the Law of Freedom: Alabama and VIrginia, 1860-1960s," Chicago-Kent Law Review 70:2 (1994), 371-437.

Waltz, Waldo Emerson. The Nationality of Married Women : A Study of Domestic Policies and International Legislation, Illinois Studies in the Social Sciences, Vol. XXII: 1, Urbana, U. Ill. Press, 1937.

Warren, Joseph. "Husband's Right to Wife's Services," Harvard Law Review 38 (Feb. 1925), pt. 1, 421-46, pt.2, 622-50.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

Case No. 09-CV-2292 VRW

REBUTTAL EXPERT REPORT OF NANCY F. COTT, Ph.D.

I make this rebuttal expert report in response to the reports served by the Defendant-Intervenors in this litigation on October 2, 2009 by Katherine Young, Ph.D. (the "Young Report"), Douglas W. Allen, Ph.D. (the "Allen Report"), and David G. Blankenhorn (the "Blankenhorn Report"). My response at trial to the testimony of Dr. Young, Dr. Allen, and Mr. Blankenhorn will be based upon my own report dated October 2, 2009 (my "Report"), and upon the facts and conclusions contained within this rebuttal report.

In connection with my anticipated testimony in this action, I may use portions of this rebuttal report or the references cited herein as exhibits. In addition, I may use various documents produced in this case that refer or relate to the matters discussed in this rebuttal report. I may also create, or assist in the creation of, demonstrative exhibits or summaries of my findings and opinions to assist me in testifying.

In preparing this rebuttal report I have reviewed and/or relied upon the sources disclosed in my initial Report, as well as those on the list of sources attached as Exhibit A. I have also relied on my years of experience in this field, as set out in my curriculum vitae, and on the materials listed therein.

I reserve the right to supplement or amend this report based on (i) any Orders that Chief Judge Walker issues; (ii) documents or other discovery that the Defendants or Defendant-Intervenors or other entities have not yet produced; or (iii) witness testimony that has not yet been given. My engagement for the production of this rebuttal expert report is under the same terms and conditions as those disclosed within my Report.

Dr. Young's expert report does not address the characteristics of marriage in the United States. She concerns herself with marriage as a religious institution and draws on religious texts and customs. As set forth in my Report, marriage law and policy in the United States

have been based on the premise and practice of civil control of marriage. The relevant context and history in this case are those of the United States, and not of world religions.

Dr. Young, Dr. Allen, and Mr. Blankenhorn all argue that the primary if not sole purpose of marriage has been to provide an ideal context for the raising of children by their biological parents, and to bind fathers to their biological children and the women who bore those children. Their effort to privilege a particular social function as "primary" has no discernable empirical basis nor methodological rigor. As a historian, I view with great skepticism any supposed "universal" in human behavior across time and culture, and I find their aim to rank one purpose of marriage above all others to be misguided. Marriage has been a lasting institution because it bundles together several complementary purposes and functions, among which the relative salience has changed over time. The notion that the main purpose of marriage is to provide an "ideal context" for the raising of children may be an individual's opinion today, but it was never the prime mover in states' structuring of the marriage institution in the United States and it cannot be isolated as the "main" reason for the state's interest today.

Governmental authorities have established and been attentive to marital policies for more than one reason. Dr. Allen concedes that "[h]istorically, marriage has been used to connect kin groups for trade and political stability, improve legitimacy over claims of inheritance, and provide life and old-age social insurance" and then claims that "[t]hese latter functions, however, were never the reasons for marriage." (Allen Report n.4 p. 4) Historical evidence does not support his attempt to subordinate important purposes of marriage to what he sees as its "core" purpose. From the point of view of the American states authorizing and regulating marriage, the institution had a far broader range of purposes including facilitating governance; creating public order and economic benefit; creating stable households;

legitimating children; assigning care-providers and thus limiting the public's liability to care for the vulnerable; facilitating property ownership and inheritance; and shaping "the people."

Dr. Allen's report advances a reductionist account of the history and purposes of marriage that is at odds with the more complex historical record. He emphasizes that marriage was "designed and evolved to regulate incentive problems that arise between a man and a woman over the life cycle of procreation." (Allen Report ¶¶ 11, 12.) More realistically according to the historical record, in Anglo-American practice of four or five centuries ago that underlies our contemporary system, marriage was designed to be a regulatory institution that established recognizable household heads who would take economic responsibility for their wives and all other dependents. In marital households, the difference in sex in the couple had at least as much to do with the sexual division of labor that organized economic survival as it had to do with assumptions about heterosexual attraction and its consequences. Because men were assumed to be capable of, prepared for and good at some kinds of work, and women also capable of and good at and prepared for another sort of work – and both sorts of work were necessary to human sustenance – the pairing of the two was implicitly the foundation of an economically viable household, and thus the basis of the marital union. That sexual division of labor is completely archaic now (and has been for some time).

Today the contemporary pattern of internal equality within marriage and household commands majority support, but that does not mean that the long-term movement toward that direction was or is embraced by all Americans. Rather, there has always been a vocal minority of American who found equalitarian families deeply offensive and dangerous, and wished to restore the patriarchal features of a previous day. By suggesting that same-sex couples should be excluded from marriage in part to preserve the institution's incorporation and "embodiment"

of gender difference, Dr. Young, Dr. Allen, and Mr. Blankenhorn implicitly rely on conceptions of male and female roles that can be traced to a time of profound *de jure* and *de facto* sexual inequality. But contemporary political thinking and economic realities (and the concomitant development of marriage law and policy) have left this kind of thinking behind.

Both Dr. Young and Dr. Allen opine that marriage as an institution has historically been dedicated to the welfare of children rather than to the welfare of the adult couple. These opinions present a false dichotomy, and shortchange the fact that marriage has always been intended to serve state and society by establishing governable and economically viable households which may hold biologically related and unrelated members. Also, without any empirical or ethical basis for doing so, their views assume that marriage based on the welfare of children obviously contributes a social good and public benefit, whereas marriage based on a couple's love and commitment is somehow NOT for the benefit of society and contributes nothing to the public good. This bifurcated view caricatures the practice of contemporary marriage and fractures logic. There is no reasonable support for the claim that a couple-based household that establishes emotional intimacy, economic benefit, and residential stability for the pair produces no social benefit nor sense of public good as compared to a household containing a couple with minor children. Also unsupported is the suggestion that the mutual commitment and happiness of the married couple is at odds with child welfare.

Such overreaching assumptions and claims of theirs are meant to shore up their emphasis on procreation as the central purpose of marriage, although that emphasis that is inconsistent with the history of marriage in the United States. Procreation has never been necessary for valid marriage in the United States; childlessness has never been grounds for divorce. The emphasis placed by Dr. Allen, Dr. Young and Mr. Blankenhorn on procreation

echoes the view of the Catholic Church in its Canon Law of a century ago (1917), which stipulated that the "primary" aim of marriage was the procreation and rearing of children, its "secondary" aim the couple's mutual support and sexual outlet. But in the wake of Vatican II even the Catholic Church eliminated this priority. Canon Law as revised in 1983 gave equal priority to the well-being of the spouses and to bearing and rearing of children.

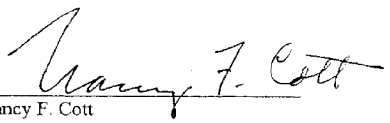
In their expert reports, Dr. Young and Dr. Allen predict dire consequences if same-sex couples are granted access to the civil institution of marriage. Dr. Blankenhorn adopts the word deinstitutionalization to cover everything about which he would raise an alarm. Empirical grounding is lacking for what they say is "likely" to occur, however. Empirically, one can observe that in the five years that marriage has been open to couples of the same sex in Massachusetts, no damage to man-woman marriage has surfaced, nor has the divorce rate increased – in fact the Massachusetts divorce rate is the lowest in the nation. The alarmism in views such as those of Dr. Young, Dr. Allen, and Dr. Blankenhorn is similar to the alarms of the opponents of woman suffrage, a century and more ago, who predicted that if women were enabled to vote, families would be racked with acrimony over politics, marriages would fall apart or never be able to form, and social life would never be the same again. Yet no discernible change in family life followed after the Nineteenth Amendment.

The extremely negative view that both Dr. Young and Dr. Allen hold regarding no-fault divorce laws as representing a destructive sea-change in the American marriage shares a similar tendency toward alarmism. Ever since divorce rates in the United States began to rise in 1860 there have always been many public spokespersons wringing their hands about the frequency of divorce, who have, nonetheless, witnessed the continuing survival and flourishing of marriage. As sociologist Andrew Cherlin has recently documented, people in the U.S. marry

more frequently than in other industrialized counties; they divorce more often, and, importantly, they re-marry far more often. Marriage flourishes in the shadow of divorce. As mentioned in my initial Report, expert economists have established that when the rise in divorce is viewed over the whole twentieth century, the innovation of the no-fault system caused only a temporary spike (1965-1980) in divorce rates and not a significant intervention in long term trends to date.[1] Any assessment of the impact of no-fault divorce laws should be viewed in this context. Also, it should be noted that adoption of no-fault divorce in the United States was part of a trend in all industrialized nations during roughly the same time period.

Dr. Allen, Dr. Young and Dr. Blankenhorn themselves concede that marriage has more than one purpose and is a changing institution. It is because of these characteristics that marriage remains valued by individuals and by the state today. In the U.S., legislators and judges sensitive to changing contexts have gradually and continually adjusted marriage to suit changing circumstances. Only by being resilient has marriage remained a lasting and valued institution.

Dated: November 9, 2009



Nancy F. Cott

[1] Betsey Stevenson and Justin Wolfers, "Marriage and Divorce: Changes and Their Driving Forces," NBER Working Paper no. 12977, issued in March 2007 (see esp. Figure 1).

Exhibit A – Additional Sources Considered
Rebuttal Report of Nancy F. Cott

Cherlin, Andrew J., "The Marriage Go-Round: The State of Marriage and the Family in America Today," New York: Alfred A. Knopf, 2009.

Stevenson, Betsey and Justin Wolfers, "Marriage and Divorce: Changes and Their Driving Forces," NBER Working Paper no. 12977, March 2007.

Other sources:

Center for Disease Control and Prevention, National Center for Vital Statistics, Division of Health Statistics, data regarding state rates of divorce, available at: http://www.cdc.gov/nchs/data/nvss/Divorce%20Rates%2090%2095%20and%2099-07.pdf

Code of Roman Catholic Canon Law, Canon 1055 § 1, (rev. 1983).

Westlaw

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44 Cal.4th 1145, 189 P.3d 959, 81 Cal.Rptr.3d 708, 08 Cal. Daily Op. Serv. 10,825, 2008 Daily Journal D.A.R. 12,889
(Cite as: 44 Cal.4th 1145, 189 P.3d 959, 81 Cal.Rptr.3d 708)

Supreme Court of California
NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC., et al., Petitioners,
v.
SAN DIEGO COUNTY SUPERIOR COURT, Respondent;
Guadalupe T. Benitez, Real Party in Interest.

No. S142892.
Aug. 18, 2008.
Modification Denied Oct. 28, 2008.
Rehearing Denied Oct. 28, 2008.

Background: Patient sued medical group and two of its employee physicians, alleging that their refusal to perform intrauterine insemination (IUI) on her violated the Unruh Civil Rights Act. Defendants asserted their federal and state constitutional right to the free exercise of religion as an affirmative defense. The Superior Court, San Diego County, No. GIC770165,Ronald S. Prager, J., granted patient's motion for summary adjudication of defendants' proffered affirmative defense. Defendants filed a petition for writ of mandate. The Court of Appeal granted petition with respect to physicians only. Patient petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:
(1) First Amendment right to free exercise does not guarantee right to deny fertility treatment to lesbian patients;
(2) physicians' inability to tell patients that they will not comply with Unruh Civil Rights Act does not violate their rights to free speech and free exercise;
(3) patient's motion for summary adjudication of physicians' constitutional affirmative defense did not violate physicians' First Amendment right to free speech;
(4) state constitution right to free exercise does not guarantee right to deny fertility treatment to lesbian patients;
(5) state power to burden right to free exercise is not limited to prohibiting acts that are licentious or inconsistent with peace or safety of State; but
(6) physicians could present evidence that they denied treatments due to patient's unmarried status rather than sexual orientation.

Reversed.

Opinion, 40 Cal.Rptr.3d 636, superseded.

Baxter, J., filed concurring opinion.

*****710** Cole Pedroza,Curtis A. Cole, Kenneth R. Pedroza, Matthew S. Levinson. Pasadena: DiCaro, Coppo & Popcke, Robert C. Coppo, Gabriele M. Prater, Carlsbad, Andrew T. Evans; Advocates for Faith and Freedom. Robert H. Tyler. Biloxi, MS; Alliance Defense Fund, Timothy D. Chandler, Folsom, and Douglas L. Edgar, Murrieta, for Petitioners.

Robert G. Ho for Pacific Justice Institute as Amicus Curiae on behalf of Petitioners.

Law Offices of Karen D. Milam, Karen D. Milam; Americans United for Life and Mailee R. Smith for Christian Medical and Dental Associations, American Association *****711** of Pro Life Obstetricians and Gynecologists and Physicians for Life as Amici Curiae on behalf of Petitioners.

James L. Hirsen, Anaheim Hills, and Deborah J. Dewart for The Foundation for Free Expression as Amicus Curiae on behalf of Petitioners.

Duane Morris, Mitchell L. Lathrop and Bridget K. Moorhead, San Diego, for Catholic Exchange, Inc., and Human Life International as Amici Curiae on behalf of Petitioners.

Patrick T. Gillen; Charles S. LiMandri and Teresa L. Mendoza, Rancho Sante Fe, for Thomas More Law Center as Amicus Curiae on behalf of Petitioners.

Alan J. Reinach; Alan E. Brownstein; Bassi, Martini & Blum and Fred Blum, San Francisco, for Seventh-day Adventist Church State Council as Amicus Curiae on behalf of Petitioners.

Center for Law & Religious Freedom, Samuel B. Casey and Gregory S. Baylor, Springfield, VA, for

Christian Legal Society as Amicus Curiae on behalf of Petitioners.

Higgs, Fletcher & Mack, Richard D. Barton and John Morris, San Diego, for The Islamic Medical Association of North America, Rabbi Elliot Dorff, Rabbi David Frank and Rabbi Arthur Gross–Schaefer as Amici Curiae on behalf of Petitioners.

Public Affairs & Religious Liberty, Alan J. Reinach; Sweeney & Greene, James F. Sweeney and Stephen J. Greene, Sacramento, for California Catholic Conference as Amicus Curiae on behalf of Petitioners.

Edwin Meese III and Peter Ferrara, St. Louis, MO, for American Civil Rights Union as Amicus Curiae on behalf of Petitioners.

Thelen Reid & Priest and Curtis A. Cole for California Medical Association as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Albert C. Gross, Solana Beach; Lambda Legal Defense and Education Fund, Jennifer C. Pizer, Jon W. Davidson, Los Angeles; Eisenberg & Hancock, Jon B. Eisenberg; O'Melveny & Meyers, Robert C. Welsh, Los Angeles, Margaret C. Carroll, Santa Monica, James J. McNamara, Los Angeles, and Lee K. Fink for Real Party in Interest.

Steven R. Zatkin, Stanley B. Watson and Mark S. Zemelman, Oakland, for Kaiser Foundation Health Plan, Inc., The Permanente Medical Group, Inc., and The Southern California Permanente Medical Group as Amici Curiae on behalf of Real Party in Interest.

Winston & Strawn, Benjamin Russell Martin, Gail J. Standish, Peter E. Perkowski and Kyle R. Gehrmann, Los Angeles, for National Health Law Program, Asian Pacific Aids Intervention Team, Asian Pacific American Legal Center of Southern California, Bienstar Human Services, California Latinas for Reproductive Justice, California Pan–Ethnic Health Network, California Women's Law Center, Coalition for Humane Immigrant Rights of Los Angeles, Jordan Rustin Coalition, Khmer Girls in Action, Latino Coalition for a Healthy California, Merger Watch Project, Mexican American Legal Defense Fund and Educational Fund, Zuna Institute, Anti–Defamation League, American Academy of HIV Medicine, American Medical Students Association, Gay and Lesbian Medical Association, International Association of Physicians in AIDS Care, The Mautner Project, National Center for Lesbian Rights and National Health Law Program as Amici Curiae on behalf of Real Party in Interest.

Shannon Minter, Vanessa H. Eisemann, San Francisco, Melanie Rowen and Catherine Sakimura for National Center for ***712** Lesbian Rights, Lyon–Martin Women's Health Services, Inc., The Mautner Project, Bay Area Lawyers for Individual Freedom and Lesbian and Gay Lawyers Association of Los Angeles as Amici Curiae on behalf of Real Party in Interest.

Morrison & Foerster, Angela L. Padilla, San Francisco, and Elizabeth O. Gill for Gay and Lesbian Medical Association, American Medical Student Association, American Academy of HIV Medicine and International Association of Physicians in Aids Care as Amici Curiae on behalf of Real Party in Interest.

James D. Esseks; Sondra Goldschein; Margaret C. Crosby, Alex M. Cleghorn, San Francisco; Clare Pastore, Los Angeles; and David Blair–Loy, San Francisco, for American Civil Liberties Union Foundation, American Civil Liberties Union of Northern California, ACLU Foundation of Southern California and American Civil Liberties Union of San Diego and Imperial Counties as Amici Curiae on behalf of Real Party in Interest.

Edmund G. Brown, Jr., Attorney General, Manuel M. Medeiros, State Solicitor General, Thomas J. Greene, Chief Assistant Attorney General, Louis Verdugo, Jr., Assistant Attorney General, Angela Sierra and Antonette Benita Cordero, Deputy Attorneys General, as Amici Curiae on behalf of Real Party in Interest.

KENNARD, J.

***1150 **962** Do the rights of religious freedom and free speech, as guaranteed in both the federal and the California Constitutions, *exempt* a medical clinic's physicians from complying with the Unruh Civil Rights Act's prohibition against discrimination based on a person's sexual orientation? Our answer is no.

I

This case comes to us after the trial court granted plaintiff's motion for summary adjudication**963 of one affirmative defense, thereby determining that no triable issue of material fact existed as to the defense and that plaintiff was entitled to judgment on the defense as a matter of law. (See Code Civ. Proc., § 437c, subds. (c), (f)(1).) The Court of Appeal issued a writ of mandate setting aside that ruling on the ground that it failed to completely dispose of the affirmative defense and thus was contrary to the statutory requirements for summary adjudication. (See Code Civ. Proc., § 437c, subd. (f)(1).) Because this case reached us pretrial, after the trial court granted plaintiff's motion for summary adjudication, our factual description comes primarily from the parties' statements of undisputed facts filed in connection with that motion.

Plaintiff Guadalupe T. Benitez is a lesbian who lives with her partner, Joanne Clark, in San Diego County. They wanted Benitez to become pregnant, and they decided on intravaginal self-insemination, a nonmedical process in which a woman inserts sperm into her own vagina. Benitez and Clark used sperm from a sperm bank. In 1999, after several unsuccessful efforts at pregnancy through this method, Benitez was diagnosed with polycystic ovarian syndrome, a disorder characterized by irregular ovulation, and she was referred to defendant North Coast Women's Care Medical Group, Inc. (North Coast) for fertility treatment.

In August 1999, Benitez and Clark first met with defendant Christine Brody, an obstetrician and gynecologist employed by defendant North Coast. Benitez mentioned that she was a lesbian. Dr. Brody explained that at some point intrauterine insemination (IUI) might have to be considered. In that medical procedure, a physician***713 threads a catheter through the patient's cervix and inserts semen through the catheter into the patient's uterus. Dr. Brody said that if IUI became necessary, her religious beliefs would preclude her from performing the procedure for Benitez.[FN1] According to Dr. Brody, she told *1151 Benitez and Clark at that initial meeting that her North Coast colleague, Dr. Douglas Fenton, shared her religious objection to performing IUI for an unmarried woman, but that either of two other North Coast physicians, Dr. Charles Stoopack and Dr. Ross Langley, could do the procedure for Benitez. According to Benitez, however, Dr. Brody said that she was the only North Coast physician with a religious objection to performing IUI for Benitez, and that "all other members of her practice—whom she believed lacked her bias—would be available" to do this medical procedure.

> FN1. The parties dispute the factual basis for Dr. Brody's religious objection to performing IUI for plaintiff. Dr. Brody claims that her religious beliefs preclude her from active participation in medically causing the pregnancy of *any unmarried* woman, and therefore her refusal to perform IUI for Benitez was based on Benitez's marital status, not her sexual orientation. But Benitez, whose complaint does not allege marital status discrimination, asserts that Dr. Brody objected to performing IUI for *a lesbian*, and consequently the alleged denial of the medical treatment at issue constituted sexual orientation discrimination. The trial court ruled that the factual basis for Dr. Brody's objection presented a disputed issue of material fact to be resolved at trial.
>
> In so ruling, the trial court apparently concluded that, at the times relevant here, California's Unruh Civil Rights Act did not prohibit discrimination based on marital status. The Court of Appeal in this case expressly so held. Because Benitez's claim for relief under the Unruh Civil Rights Act is not based on marital status discrimination, we do not address that issue.

From August 1999 through June 2000, Dr. Brody treated Benitez for infertility. The treatment consisted chiefly of prescribing Clomid, an ovulation-inducing medication, followed by Benitez's use of intravaginal self-insemination with sperm obtained from a sperm bank. To determine whether Benitez's fallopian tubes were blocked, Dr. Brody had her take a medical test (hysterosalpingiogram), which was negative. After performing a surgical procedure (diagnostic laparoscopy), Dr. Brody determined that Benitez's infertility was not the result of endometriosis.[FN2]

> FN2. "Endometriosis is a condition in which tissue similar to the lining of the uterus" oc-

curs on the ovaries, the fallopian tubes, or elsewhere in the body. Between 30 and 40 percent of women with this condition may suffer from infertility. (See <http:// www. endo metriosis. org/ endo metriosis. html> [as of Aug. 18, 2008].)

According to Benitez, when in April 2000 she still had not become pregnant, she decided**964 "with the advice and consent of Dr. Brody," to try IUI, which, as explained earlier, is a medical procedure in which a physician uses a catheter to insert sperm directly into the patient's uterus. Instead, in May 2000, Benitez resorted to the nonmedical procedure of intravaginal self-insemination that she had used before; but this time, rather than using sperm from a sperm bank as she had done earlier, she used fresh sperm donated by a male friend. When Benitez thereafter missed a menstrual period, she thought she was pregnant. But a home pregnancy test was negative, and a pregnancy test done at defendant North Coast's facilities on July 5, 2000, confirmed that she was not pregnant. Benitez then decided to try IUI, using her friend's fresh sperm.

*1152 The parties agree that when Benitez told Dr. Brody she wanted to use her friend's donated fresh sperm for the IUI, Brody replied that this would pose a problem for North Coast. Its physicians had ***714 performed IUI either with fresh sperm provided by a patient's husband or sperm from a sperm bank, but never with fresh sperm donated by a patient's friend. To do the latter, Dr. Brody said, might delay the procedure as North Coast would first have to confirm that its protocols pertaining to donated fresh sperm would satisfy the requirements of North Coast's state tissue bank license and the federal Clinical Laboratory Improvement Amendment (42 U.S.C. § 263). After hearing this, Benitez opted to have the IUI with sperm from a sperm bank. Dr. Brody so noted in Benitez's medical records and then left for an out-of-state vacation.

During Dr. Brody's absence, her colleague, Dr. Douglas Fenton, took over Benitez's medical care. Dr. Fenton contends that he was unaware of Dr. Brody's record notation of Benitez's decision *not* to use her friend's fresh sperm for the IUI, because the secretary who had typed that notation in Benitez's file left it in Dr. Brody's in box awaiting her return from vacation. Therefore, according to Dr. Fenton, he mistakenly believed that Benitez intended to have IUI with fresh sperm donated by a friend. The parties agree that unlike sperm from a sperm bank, fresh sperm (even when provided by a patient's husband) requires "certain preparation" before it can be used for IUI, and that "[c]ertain licensure" is necessary to do the requisite sperm preparation. Of North Coast's physicians, only Dr. Fenton was licensed to perform these tasks. But he refused to prepare donated fresh sperm for Benitez because of his religious objection. Two of his colleagues, Drs. Charles Stoopack and Ross Langley, had no such religious objection, but unlike Dr. Fenton, they were not licensed to prepare fresh sperm. Dr. Fenton then referred Benitez to a physician outside North Coast's medical practice, Dr. Michael Kettle.

The IUI performed by Dr. Kettle did not result in a pregnancy. Benitez was unable to conceive until June 2001, when Dr. Kettle performed in vitro fertilization.[FN3]

FN3. In vitro fertilization is a medical procedure of assisted reproduction in which eggs and sperm are combined in a laboratory dish. When fertilization results, the embryo is transferred to the woman's uterus for development. (See <http:// www. american pregnancy. org/ infertility/ ivf. html> [as of Aug. 18, 2008].)

In August 2001, Benitez sued North Coast and its physicians, Brody and Fenton, seeking damages and injunctive relief on several theories, notably sexual orientation discrimination in violation of California's Unruh Civil Rights Act. Defendants' answer to the complaint asserted a variety of affirmative defenses. Pertinent here is affirmative defense No. 32 stating that **1153 defendants' "alleged misconduct, if any" was protected by the rights of free speech and freedom of religion set forth in the federal and state Constitutions.

Benitez moved for summary adjudication of that defense. The trial court granted the motion, ruling that neither the federal nor the state Constitution provides a religious defense to a claim of sexual orientation discrimination under California's Unruh Civil Rights Act. Defendants challenged that ruling through a petition for writ of mandate filed in the Court of Appeal. That court granted the petition with

respect to the two physician defendants only, thereby allowing Drs. Brody and Fenton to later assert at trial that their constitutional rights of free speech ****965** and religious freedom exempt them from complying with the Unruh Civil Rights Act's prohibition against sexual orientation discrimination. We granted Benitez's petition for review.

II

Benitez's claim of sexual orientation discrimination is based on California's Unruh *****715** Civil Rights Act (hereafter sometimes Act). (Civ.Code, § 51, subd. (a).) At the times relevant here, it provided: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ.Code, § 51, former subd. (b), as amended by Stats.2000, ch. 1049.)

The Unruh Civil Rights Act's antidiscrimination provisions apply to business establishments that offer to the public "accommodations, advantages, facilities, privileges, or services." (Civ.Code, § 51, subd. (b); see *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 700, 72 Cal.Rptr.2d 410, 952 P.2d 218; *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 622–623, 42 Cal.Rptr.2d 50, 896 P.2d 776.) A medical group providing medical services to the public has been held to be a business establishment for purposes of the Act. (*Leach v. Drummond Medical Group, Inc.* (1983) 144 Cal.App.3d 362, 192 Cal.Rptr. 650.)

In 1999 and 2000, the period relevant here, the Unruh Civil Rights Act did not list sexual orientation as a prohibited basis for discrimination. But before 1999, California's reviewing courts had, in a variety of contexts, described the Act as prohibiting sexual orientation discrimination. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155, 278 Cal.Rptr. 614, 805 P.2d 873; *Curran v. Mount Diablo Council of the Boy Scouts, supra,* 17 Cal.4th 670, 703, 72 Cal.Rptr.2d 410, 952 P.2d 218 (conc. opn. of Mosk, J.); *Hubert v. Williams* (1982) 184 Cal.Rptr. 161, 133 Cal.App.3d Supp. 1, 5; see also *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716, 234 P.2d 969; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d ***1154** 289, 292, 200 Cal.Rptr. 217.) Through an amendment to the Act in 2005, the Legislature expressly prohibited sexual orientation discrimination. (Stats.2005, ch. 420, § 2.)

The Unruh Civil Rights Act subjects to liability "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to [the Act]." (Civ.Code, § 52, subd. (a).) Thus, liability under the Act for denying a person the "full and equal accommodations, advantages, facilities, privileges, or services" of a business establishment (Civ.Code, § 51, subd. (b)) extends beyond the business establishment itself to the business establishment's employees responsible for the discriminatory conduct.

Below, we discuss defendant physicians' claims, first under the federal Constitution, and then under the California Constitution.

III

[1][2][3] The First Amendment to the federal Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...." (U.S. Const., 1st Amend.) This provision applies not only to Congress but also to the states because of its incorporation into the Fourteenth Amendment. (See *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 876–877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (*Smith*).) With respect to the free exercise of religion, the First Amendment "first and foremost" protects "the right to believe and profess whatever religious doctrine one desires." (*Smith, supra,* at p. 877, 110 S.Ct. 1595.) Thus, it "obviously excludes all 'government regulation of religious *beliefs* as such.' " (*Ibid.*) Below, we discuss pertinent decisions of the high *****716** court construing the First Amendment's guarantee of the free exercise of religion.

Sherbert v. Verner (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (*Sherbert*) involved South Carolina's denial of unemployment benefits to a Seventh-day Adventist who refused on religious grounds to work on Saturdays. The high court held that restricting ****966** unemployment benefit eligibility to those who could work on Saturdays was a "substantial infringement" of the claimant's First Amendment rights, and it declared the state law unconstitutional because it lacked a "compelling [governmental] in-

terest." (*Id.* at pp. 406–407, 83 S.Ct. 1790.)

Nine years later, the United States Supreme Court reiterated that test in *Wisconsin v. Yoder* (1972) 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (*Yoder*). At issue there was a Wisconsin law that required all children ages seven to 16 to attend school. Members of the Old Order Amish religion and ***1155** the Conservative Amish Mennonite Church, however, kept their children out of school once they completed the eighth grade. (*Id.* at pp. 208–209, 92 S.Ct. 1526.) *Yoder* held that under the First Amendment's clause guaranteeing the free exercise of religion, the Amish were exempt from obeying the state law in question because their "objection to formal education beyond the eighth grade [was] firmly grounded" in their religious beliefs, and the State of Wisconsin lacked a compelling interest in applying the compulsory education law to Amish children. (*Id.* at p. 210, 92 S.Ct. 1526; see *id.* at pp. 214, 219, 234, 92 S.Ct. 1526.)

But then in 1990, in *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, the high court repudiated the compelling state interest test it had used in *Sherbert, supra,* 374 U.S. 398, 83 S.Ct. 1790, and in *Yoder, supra,* 406 U.S. 205, 92 S.Ct. 1526. Instead, it announced that the First Amendment's right to the free exercise of religion "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " (*Smith, supra,* at p. 879, 110 S.Ct. 1595.) Three years later, the court reiterated that holding in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (*Lukumi*), stating that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."

[4] Thus, under the United States Supreme Court's most recent holdings, a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs.

Just four years ago, in *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 10 Cal.Rptr.3d 283, 85 P.3d 67 (*Catholic Charities*), we considered the claim of a nonprofit entity affiliated with the Roman Catholic Church (Catholic Charities) that the First Amendment's guarantee of free exercise of religion exempted it from complying with a California law, the Women's Contraception Equity Act (WCEA), which required employers that provide prescription drug insurance coverage for their employees to include coverage for prescription contraceptives. In rejecting that claim, we applied the test the United States Supreme Court had adopted in its 1990 decision in *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876. We explained: "The WCEA's requirements apply neutrally and generally to all employers, regardless of *****717** religious affiliation, except to those few who satisfy the statute's strict requirements for exemption on religious grounds. The act also addresses a matter the state is free to regulate; it regulates the content of insurance policies for the purpose of eliminating a form of gender discrimination in health benefits. The act conflicts with Catholic Charities' religious ***1156** beliefs only incidentally, because those beliefs happen to make prescription contraceptives sinful." (*Catholic Charities, supra,* at p. 549, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

[5] In this case, too, with respect to defendants' reliance on the First Amendment, we apply the high court's *Smith* test. California's Unruh Civil Rights Act, from which defendant physicians seek religious exemption, is "a valid and neutral law of general applicability" (*Smith, supra,* 494 U.S. at p. 879, 110 S.Ct. 1595). As relevant in this case, it requires business establishments to provide "full and equal accommodations, advantages, facilities, privileges, or services" to all persons notwithstanding their sexual orientation. (Civ.Code, § 51, subds. (a) & (b).) ****967** Accordingly, the First Amendment's right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act's antidiscrimination requirements even if compliance poses an incidental conflict with defendants' religious beliefs. (*Lukumi, supra,* 508 U.S. at p. 531, 113 S.Ct. 2217; *Smith, supra,* at p. 879, 110 S.Ct. 1595.)

Defendant physicians, however, insist that the high court's decision in *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, has language on "hybrid rights" that lends support to their argument that under the First Amendment they are exempt from complying with the antidiscrimination provi-

sions of California's Unruh Civil Rights Act. The pertinent passage in *Smith* states: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections...." (*Smith,* at p. 881, 110 S.Ct. 1595.) But the facts in *Smith,* the court explained, did "not present such a hybrid situation." (*Id.* at p. 882, 110 S.Ct. 1595.) Defendants here contend that they do have a hybrid claim, because compliance on their part with the state's Act interferes with a combination of their First Amendment rights to free speech and to freely exercise their religion. We rejected a similar hybrid claim in *Catholic Charities, supra,* 32 Cal.4th 527, 10 Cal.Rptr.3d 283, 85 P.3d 67.

In that case, we explained that "[t]he high court has not, since the decision in *Smith, supra,* 494 U.S. 872[, 110 S.Ct. 1595], determined whether the hybrid rights theory is valid or invoked it to justify applying strict scrutiny to a free exercise claim." (*Catholic Charities, supra,* 32 Cal.4th at p. 557, 10 Cal.Rptr.3d 283, 85 P.3d 67.) We added, however, that Justice Souter's concurring opinion in *Lukumi, supra,* 508 U.S. 520, 567, 113 S.Ct. 2217, was critical of the idea that hybrid rights would give rise to a stricter level of scrutiny: " '[I]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule....' " (*Catholic Charities, supra,* at pp. 557–558, 10 Cal.Rptr.3d 283, 85 P.3d 67, quoting *Lukumi, supra,* at p. 567, 113 S.Ct. 2217 (conc. opn. of Souter, J.).) We also noted that the federal Court of Appeals for the Sixth Circuit had rejected as " 'completely illogical' the proposition that 'the legal standard [of review] ***1157** under the Free Exercise Clause depends on whether a free-exercise claim is *****718** coupled with other constitutional rights.' (*Kissinger v. Board of Trustees* | (1993)] 5 F.3d 177, 180 & fn. 1.)" (*Catholic Charities, supra,* at p. 558, 10 Cal.Rptr.3d 283, 85 P.3d 67.) Nonetheless, after assuming for argument's sake that "the hybrid rights theory is not merely a misreading of *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595," we concluded that Catholic Charities had "not alleged a meritorious" claim under that theory. (*Ibid.*) We also rejected the contention by Catholic Charities that requiring it to provide prescription contraceptive coverage to its employees would violate its First Amendment right to free speech "by requiring the organization to engage in symbolic speech it finds objectionable." (*Ibid.*) As we explained, "compliance with a law regulating health care benefits is not speech." (*Ibid.*)

[6][7] Here, defendant physicians contend that exposing them to liability for refusing to perform the IUI medical procedure for plaintiff infringes upon their First Amendment rights to free speech and free exercise of religion. Not so. As we noted earlier, California's Unruh Civil Rights Act imposes on business establishments certain antidiscrimination obligations, thus precluding any such establishment or its agents from telling patrons that it will not comply with the Act. Notwithstanding these statutory obligations, defendant physicians remain free to voice their objections, religious or otherwise, to the Act's prohibition against sexual orientation discrimination. "For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition." (*Catholic Charities, supra,* *****968*** 32 Cal.4th at pp. 558–559, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

[8] Defendant physicians also perceive a form of free speech infringement flowing from plaintiff's purported efforts "to silence the doctors at trial." But the First Amendment prohibits *government* abridgment of free speech. Here, plaintiff is a private citizen. Therefore, her conduct as complained of by defendants does not fall within the ambit of the First Amendment.

Plaintiff's motion in the trial court for summary adjudication of defendant physicians' affirmative defense claiming a religious exemption from liability under California's Unruh Civil Rights Act merely sought to preclude the presentation at trial of a defense lacking any constitutional basis. In ruling on the motion, the trial court granted summary adjudication of the defense only insofar as it applied to plaintiff's claim of sexual orientation discrimination as prohibited by the Act. (See p. 17, *post.*) Nothing in that ruling precludes defendants from later at trial offering evidence, if relevant, that their denial of ***1158** the medical treatment at issue was prompted by their religious beliefs for reasons *other* than plain-

tiff's sexual orientation.

IV

We now turn to the California Constitution. As here relevant, it provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." (Cal. Const., art. I, § 4.)

Part III, *ante,* dealt with defendant physicians' First Amendment claim. To that federal constitutional issue, we applied the high court's test articulated in *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876. That test's main inquiry is whether the law being challenged is a " 'valid and neutral law of general applicability.' " (*Id.* at p. 879, 110 S.Ct. 1595.) If ***719** it is, it "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (*Lukumi, supra,* 508 U.S. at p. 531, 113 S.Ct. 2217.) That test, we noted, was a departure from the compelling state interest test that the high court had applied in *Sherbert, supra,* 374 U.S. 398, 83 S.Ct. 1790, and in *Yoder, supra,* 406 U.S. 205, 92 S.Ct. 1526. (See 81 Cal.Rptr.3d at p. 716, 189 P.3d at p. 966, *ante.*)

Here, defendant physicians seek a religious exemption from a state law that is " 'a valid and neutral law of general applicability' " (*Smith, supra,* 494 U.S. at p. 879, 110 S.Ct. 1595; see 81 Cal.Rptr.3d at p. 717, 189 P.3d at p. 966, *ante.*) To date, this court has not determined the appropriate standard of review for such a challenge under the *state* Constitution's guarantee of free exercise of religion. (See *Catholic Charities, supra,* 32 Cal.4th at pp. 561–562, 10 Cal.Rptr.3d 283, 85 P.3d 67.) Because construing a state constitution is a matter left exclusively to the states, the high court's *Smith* test is not controlling here. (*Catholic Charities, supra,* at pp. 559–561, 10 Cal.Rptr.3d 283, 85 P.3d 67.) As in *Catholic Charities,* however, this case presents no need for us to determine the appropriate test. For even under a strict scrutiny standard, defendants' claim fails.

[9] Under strict scrutiny, "a law could not be applied in a manner that substantially burden[s] a religious belief or practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a compelling interest." (*Catholic Charities, supra,* 32 Cal.4th at p. 562, 10 Cal.Rptr.3d 283, 85 P.3d 67.) Presumably, for defendants to comply with the Unruh Civil Rights Act's prohibition against sexual orientation discrimination would substantially burden their religious beliefs. Yet that burden is insufficient to allow them to engage in such discrimination. The Act furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal.

***1159** To avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions, defendant physicians can simply refuse to perform the IUI medical procedure at issue here for any patient of North Coast, the physicians' employer. Or, because they incur liability under the Act if they infringe ****969** upon the right to the " full and equal" services of North Coast's medical practice (Civ.Code, § 51, subd. (b); see *id.* §§ 51, subd. (a), 52, subd. (a)), defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI receives "full and equal" access to that medical procedure though a North Coast physician lacking defendants' religious objections.

[10] Both defendant physicians urge this court to adopt and apply here a standard that is significantly different than strict scrutiny. They rely on this language from our state Constitution, article I, section 4: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. *This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.*" (Italics added.) According to defendants, the italicized language indicates that religious objectors are free to disregard a particular state law unless doing so compromises the peace or safety of the state or is licentious—situations that are not present here. Defendants also assert that our decision in *Catholic Charities* has language, italicized here, that left open the possibility of the test ***720** proposed by defendants: "A future case might lead us to choose the rule of *Sherbert, supra,* 374 U.S. 398, 83 S.Ct. 1790 [requiring that a state law adversely affecting religious rights satisfy strict scrutiny], the rule of *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595 [recognizing no religious exemption to valid and neutral laws of general applicability], *or an as-yet unidentified rule that more precisely reflects the language and history of the California Constitution and our own understanding of its import.*" (*Catholic Charities, supra,* 32

Cal.4th at p. 562, 10 Cal.Rptr.3d 283, 85 P.3d 67, italics added.) We reject defendants' contention.

Our statement in *Catholic Charities, supra,* 32 Cal.4th at page 562, 10 Cal.Rptr.3d 283, 85 P.3d 67, that this court in the future might adopt some "as-yet unidentified rule" governing free exercise of religion claims under the *state* Constitution contemplated only three possible tests: (1) The strict scrutiny standard the United States Supreme Court established in *Sherbert, supra,* 374 U.S. 398, 83 S.Ct. 1790, and later used in *Yoder, supra,* 406 U.S. 205, 92 S.Ct. 1526; (2) the high court's subsequent test established in *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, and in *Lukumi, supra,* 508 U.S. 520, 113 S.Ct. 2217, under which religious objectors' challenges to valid and neutral laws of general applicability are rejected out of hand; or (3) an *intermediate standard,* less exacting than the rigorous first option but more so than the second. Because the standard that defendants propose would exempt a religious objector from complying with a valid and neutral law of general applicability regardless of a compelling state interest supporting the law, and regardless of the absence of lesser restrictive means for furthering that compelling state interest, their ***1160** proposed standard is not an intermediate standard but rather a standard that is more stringent than strict scrutiny. Nothing in *Catholic Charities* suggests that the appropriate test for free exercise of religion claims under article 1, section 4 of the California Constitution would be stricter than strict scrutiny, and we decline to adopt such a standard here.

V

[11] The Court of Appeal set aside the trial court's order granting plaintiff's motion for summary adjudication of affirmative defense No. 32. According to the Court of Appeal, the trial court's ruling was inconsistent with the purpose of Code of Civil Procedure section 437c, which governs motions for summary adjudication. Relevant here is that statute's subdivision (f)(1), which states: "A party may move for summary adjudication as to one or more causes of action within an action, *one or more affirmative defenses,* one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or both, or that there is no merit to a claim for damages, ... or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. *A motion for summary adjudication shall be granted only if it completely disposes* of a cause of action, *an affirmative defense,* a claim for damages, or an issue of duty." (§ 437c, subd. (f)(1), italics added.) ****970** As the italicized language in the last sentence indicates, a grant of summary adjudication of an affirmative defense is proper if it "completely disposes" of that defense.

Here, in reversing the trial court's grant of plaintiff's motion for summary adjudication of affirmative defense No. 32 with respect to plaintiff's Unruh Civil Rights Act claim, the Court of Appeal noted that section 437c was added to the Code of Civil Procedure at the request of the California *****721** Judges Association, and that the statute was intended to "save court time," to "reduce the cost of litigation" and to "stop the practice of ... adjudication of issues that do not completely dispose of a cause of action or defense."

The Court of Appeal then concluded that summary adjudication of affirmative defense No. 32 was "improper as to Dr. Brody and Dr. Fenton because it effectively preclude[d] them from presenting any evidence at trial that their refusal to perform IUI for Benitez was based on their religious beliefs regarding the propriety of performing the procedure for unmarried women," conduct that the Court of Appeal further concluded was not prohibited by the Act in 2000, the time of that refusal. The court added: "Because there is a triable issue of fact as to whether Dr. Brody and Dr. Fenton refused to perform the procedure for Benitez based on her marital status and not her sexual orientation, ... Dr. Brody and Dr. Fenton are entitled to present ***1161** evidence that their religious beliefs prohibited them from performing IUI on *any* unmarried woman, regardless of the woman's sexual orientation."

[12] But in granting plaintiff's motion for summary adjudication of affirmative defense No. 32, the trial court did not at all preclude defendant physicians from later offering evidence at trial of their religious grounds for refusing to perform the IUI medical procedure for plaintiff because of her marital status as an unmarried woman rather than her sexual orientation as a lesbian. In granting Benitez's motion, the trial court stated that it had merely determined that affirmative defense No. 32 lacked any basis in law as a defense to plaintiff's Unruh Civil Rights Act claim of

sexual orientation discrimination, but that it was not precluding defendant physicians from "tell [ing] the jury what happened in this case," that is, presenting evidence that their religious beliefs prohibited them from medically inseminating an unmarried woman. This is clear from the following colloquy between the trial court and plaintiff's counsel.

Counsel for plaintiff asked the trial court: "What basis would there be for [defendant physicians to] present[ ] their motive to the jury if not to say it was okay that you violated Unruh because you had this religious belief?" The trial court responded that the jurors "are still going to know what the motive [was]," and that defendants "have to tell the jury what happened in this case." Plaintiff's counsel then argued that testimony about defendant physicians' religious motivation for refusing to perform the IUI medical procedure for plaintiff would be "legally irrelevant." The trial court replied: "Facts are the facts, and the jury is instructed on the law and ... is going to follow the law." Ultimately, the trial court agreed to allow plaintiff to reassert at trial her objection to defendants presenting any evidence of religious motive to support their claim that their refusal to perform the IUI medical procedure was based on plaintiff's marital status as a single woman rather than her sexual orientation as a lesbian. Although the trial court reserved any final ruling on the matter, it added that plaintiff's position would make "an interesting argument," and that it had "a hard time envisioning how this case would be presented without telling the jury what happened."

Thus, the trial court's ruling left defendant physicians free to later offer evidence at trial that their religious objections were to participating in the medical insemination of an unmarried woman and were not based on plaintiff's sexual orientation, as her complaint alleged. The trial court's ruling simply narrowed the issues in this case by disposing of defendants' contention that their constitutional rights to free ***722** speech and the free exercise of religion exempt them from complying with the Unruh Civil Rights Act's prohibition against sexual orientation discrimination. In concluding to the contrary, the Court of Appeal erred.

***1162 **971 DISPOSITION**

The judgment of the Court of Appeal is reversed.

WE CONCUR: GEORGE, C.J., and BAXTER, WERDEGAR, CHIN, MORENO, and CORRIGAN, JJ.

Concurring Opinion by BAXTER, J.

I join the majority's narrow conclusion that, on the facts of this case, defendants have no affirmative defense, based on the free exercise of religion clauses of the federal and state Constitutions, against plaintiffs' Unruh Civil Rights Act claims of discrimination on the basis of sexual orientation. With respect to the application of article I, section 4 of the California Constitution to this issue, I do not necessarily believe the state has a compelling interest in eradicating every difference in treatment based on sexual orientation (cf. *In re Marriage Cases* (2008) 43 Cal.4th 757, 875–877, 76 Cal.Rptr.3d 683, 183 P.3d 384 (conc. & dis. opn. of Baxter, J.) [sexual orientation is not suspect classification; statutory definition of marriage as between man and woman satisfies rational basis test]). However, I agree that California has a compelling interest, furthered by the Unruh Civil Rights Act, "in ensuring *full and equal access to medical treatment* irrespective of sexual orientation" (maj. opn., *ante,* 81 Cal.Rptr.3d at p. 719, 189 P.3d at p. 969, italics added), including a right to full medical assistance in establishing a pregnancy.

Of course, assuming that a strict scrutiny standard applies under the California Constitution, the state's interest—here represented in a statute—must be balanced, in appropriate cases, against the fundamental *constitutional* right to the free exercise of religion. I am persuaded that, in the circumstances before us, the burden imposed on this constitutional right was not sufficient to overcome the state's interest. As the majority indicates, defendants in this case, who are members of a group medical practice, can avoid any conflict between their religious beliefs and the Unruh Civil Rights Act's requirements "by ensuring that every patient requiring [intrauterine insemination] receives 'full and equal' access to that medical procedure *through a North Coast physician lacking defendants' religious objections.*" (Maj. opn., *ante,* 81 Cal.Rptr.3d at p. 719, 189 P.3d at p. 969, italics added.)

I am not so certain this balance of competing interests would produce the same result in the case of a sole practitioner, who arguably is a "business establishment[ ]" for purposes of the Unruh Civil Rights Act (Civ.Code, § 51, subd. (b); see *Washington v.*

Blampin (1964) 226 Cal.App.2d 604, 606–607, 38 Cal.Rptr. 235), but who lacks the opportunity to ensure the patient's treatment by another member of the same establishment. At least where the patient could be referred with relative ease and convenience to another ***1163** practice, I question whether the state's interest in full and equal medical treatment would compel a physician in solo practice to provide a treatment to which he or she has sincere religious objections. One might well conclude that, in that situation, application of the Unruh Civil Rights Act against the doctor would not be the means " 'least restrictive' " on religion of furthering the state's legitimate interest. (Maj. opn., *ante,* 81 Cal.Rptr.3d at p. 719, 189 P.3d at p. 968; *Catholic Charities of* ******723*** *Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

These issues are not before us here, however, and the majority does not express any views on them. On that basis, and with that understanding, I concur in the majority's reasoning, and in its result.

Cal.,2008.
North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court
44 Cal.4th 1145, 189 P.3d 959, 81 Cal.Rptr.3d 708, 08 Cal. Daily Op. Serv. 10,825, 2008 Daily Journal D.A.R. 12,889

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ARCHDIOCESAN AGENCY AIDS IN ADOPTIONS BY GAYS ; SAYS IT'S BOUND BY ANTIBIAS LAWS

[THIRD Edition]

Boston Globe - Boston, Mass.
Author: Patricia Wen, Globe Staff
Date: Oct 22, 2005
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Document Text

Despite Vatican teachings that allowing homosexuals to adopt children is "gravely immoral," the social services agency of the Archdiocese of Boston has allowed 13 foster children to be adopted by same-sex couples in the past two decades, saying state regulations prohibit the agency from discriminating based on sexual orientation.

"If we could design the system ourselves, we would not participate in adoptions to gay couples, but we can't," said the Rev. J. Bryan Hehir, president of Catholic Charities in Boston. "We have to balance various goods."

The 13 adoptions a tiny fraction of the 720 placed by Catholic Charities in that period took place as part of a contract with the state Department of Social Services. The children placed with the gay couples are among those most difficult to place, either because they have physical or emotional problems or they are older.

Hehir described Catholic Charities's decision to permit these adoptions as a legal accommodation in the name of a greater social good. He said if they did not comply with the state's nondiscrimination clause, they would not be able to do the state work that enables them to place hundreds of foster children in stable homes.

However, Hehir's view is not shared by everyone at Catholic Charities in Boston. Peter Meade, who is chairman of the board, said he believes that the agency should welcome same-sex couples to adopt, and not just because of a contractual requirement with DSS. "What we do is facilitate adoptions to loving couples," he said. "I see no evidence that any child is being harmed."

Catholic Charities's placement of children with gays and lesbians began in 1987, when the agency signed its state adoption contract, said Debbie Rambo, vice president of programs for Catholic Charities. She said the 13 adoptions were "scattered" throughout the last 18 years, with the last one occurring this year. She said the 13 children placed with same-sex couples fared as well as those adopted by heterosexual couples.

Gays and lesbians who wish to adopt foster children can either approach DSS or work through one of the private agencies, such as Catholic Charities, that help the state with such placements. These agencies attempt to match prospective parents, who have gone through state-required training to prepare for adoption, with one of the hundreds of foster children ready for adoption through DSS.

Not all dioceses in Massachusetts work with gay couples. At Catholic Charities of Worcester, same-sex couples are referred to other adoption agencies, said executive director Catherine Loeffler.

DSS spokeswoman Denise Monteiro said yesterday she has never heard of any adoption agency, including Catholic Charities of Worcester Diocese, being permitted to circumvent the state's nondiscrimination policy. Monteiro said DSS would investigate.

Catholic Charities organizations throughout the country run independently and are free to set their adoption rules based on the state laws that govern them, as well as the priorities of the archdiocese officials in their community.

Catholic Charities in Dallas, for instance, refers same-sex individuals seeking to adopt to other agencies, and there is no state policy that prohibits them from doing that, said its executive director, Sister Mary Ann Owens. But in San Francisco, Catholic Charities has placed a few children with same-sex couples because that proved to be the best match, said Brian Cahill, its executive director. Although California has an anti-discrimination law similar to Massachusetts, Cahill said that wasn't what influenced his agency to make the placements in gay households. "It was in the best interests of the child, and that's the Christian Catholic operating principle to live by," he said.

He said that of the 104 children who were placed by his agency between 1999 and 2003, three were to gays or

lesbians. He said he did not have more current statistics available.

Officials at several Catholic Charities offices across the country said the primary reason they have so few same-sex adoptions is because many gays and lesbians do not approach them, given the church's condemnation of homosexuality.

In recent years, adoption agencies with Jewish or Luthern affiliations have accepted applications from gays and lesbians at a far higher rate than Catholic or Methodist groups, said Adam Pertman, executive director of the Evan B. Donaldson Adoption Institute, a research and advocacy group, which conducted a national study of same-sex adoptions in 2003.

Pertman said it makes sense that some Catholic agencies would be willing to compromise when it comes to placing foster children with special needs: both groups face a competitive disadvantage in the world of adoption same-sex couples may be passed over in favor of heterosexual ones, and older children who come with physical or emotional problems are often passed over in favor of healthy babies by prospective adoptive families.

Nonetheless, these matches are still in violation of the Catholic doctrines, said C. J. Doyle, executive director of the Catholic Action League of Massachusetts, a conservative Catholic organization that lobbies on political and social issues. The Vatican, on its website, says that allowing homosexual couples to adopt children does "violence" to them.

Doyle said Catholic Charities in Boston ought to have the benefit of a "conscience clause," exempting them from having to place foster children with any gay families.

"No religious organization ought to be forced to compromise its principle as a condition of its social services," he said.

Hehir said that to his knowledge, his agency has never sought an exemption from the nondiscrimination language.

Rambo said Catholic Charities also has a separate DSS contract to conduct followup studies of all adoptions involving foster children in Eastern Massachusetts to observe the adjustments of children who are placed in same-sex families by other agencies as well.

Hehir emphasized that his agency's policy is to focus on the best interests of the children, who are often desperate for a stable home after much disruption in their lives. He said Catholic Charities had to choose between its mission of helping the maximum number of foster children possible and conforming to the Vatican's position on homosexuality.

"We were faced with an either-or situation," he said.

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Abstract (Document Summary)

[J. Bryan Hehir]'s view is not shared by everyone at Catholic Charities in Boston. Peter Meade, who is chairman of the board, said he believes that the agency should welcome same-sex couples to adopt, and not just because of a contractual requirement with DSS. "What we do is facilitate adoptions to loving couples," he said. "I see no evidence that any child is being harmed."

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The Boston Herald

March 2, 2006 Thursday
ALL EDITIONS

Editorial;
Gay adoption issue puts heat on gov

SECTION: EDITORIAL; Pg. 030

LENGTH: 308 words

It is bewildering enough that four Catholic bishops in Massachusetts should be so out of touch with their own flocks as to create a controversy where none has existed for two decades. But it is truly horrifying that they have now found an enabler in the Corner Office.

The church is seeking relief from the state's anti-discrimination law so that Catholic social services agencies may opt NOTto place children with same-sex couples. To do so, the bishops note, violates church teaching.

It's worth noting that of 720 placements over the past 20 years, Catholic Charities of Boston has placed only 13 children - all hard-to-place foster kids who were older or had special needs - with same-sex parents.

In other words, the agency recognizes that a gay couple is not the perfect match in the eyes of the Vatican, so it is done in the rarest of circumstances.

But the bishops apparently never bothered to consult Catholic Charities on this one. All 42 board members are in favor of allowing same-sex adoptions - at the very least, because they are REALISTS. They know that to operate as a quasi-state agency - which they do - they must play by the state's rules. Seven board members, including some of Boston's biggest movers and shakers, have resigned in protest.

Gov. Mitt Romney, moving ever rightward, must have been disappointed to learn that he couldn't simply issue an executive order exempting the agency from the anti-discrimination law. Yesterday following a meeting with Archbishop Sean O'Malley, he issued a statement saying, ``Ultimately legislaton may need to be filed to provide an exemption based on religious principles."

The Legislature appears mercifully reluctant to join the party. But that means Catholic Charities might very well lose its state license to place needy children in loving, welcoming homes.

And THAT would truly be a sin.

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CHURCH REVIEWS ROLE IN GAY ADOPTIONS

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Document Text

Top Catholic officials in Massachusetts are convening a special committee to review whether certain policies, which allow its social services agencies to handle adoptions by same-sex couples, can continue, given the church's teachings that call such placements "gravely immoral."

The committee will include the four bishops in Massachusetts representing the dioceses based in Boston, Worcester, Springfield, and Fall River and officials hope to reach conclusions within three months, said Edward Saunders Jr., executive director of the Massachusetts Catholic Conference, the public policy office for the bishops in the state. He said not all committee members have been named yet.

"We're pulling it together now," Saunders said yesterday about the committee, first reported in The Pilot, the newspaper of the Catholic Archdiocese of Boston.

Two weeks ago, the Globe reported that Catholic Charities, the social services arm of the Catholic Archdiocese of Boston, allowed 13 children to be adopted by gay or lesbian couples in the past two decades. The Rev. J. Bryan Hehir, president of Catholic Charities in Boston, had said his agency had to comply with state regulations that prohibit discrimination based on sexual orientation.

He had said those 13 adoptions a tiny fraction of the 720 handled by Catholic Charities in that period took place as part of an adoption contract with the state Department of Social Services to place older foster children and those with special needs. He said he wanted to continue his agency's work for DSS but would rather not be legally forced to go along with same-sex adoptions.

Others within the leadership of Catholic Charities in Boston, however, said they did not think the agency should back away from handling adoptions by same-sex couples, especially because none has proved harmful.

Peter Meade, board chairman of Catholic Charities, did not have any comment yesterday on the committee, saying he wanted to speak first to his entire board.

Not all dioceses in the state worked with gay couples. Officials at Catholic Charities of Worcester say they refer same-sex couples to other adoption agencies.

Saunders said the review committee will try to determine how to reconcile the Vatican pronouncements against adoptions by same-sex couples with the state's antidiscrimination laws. He said he has not ruled out the possibility that the committee would ask the state for a "conscience clause," exempting the agencies from the requirement to consider same-sex couples on the grounds that it violates religious principles.

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requirement to consider same-sex couples on the grounds that it violates religious principles.

BISHOPS TO OPPOSE ADOPTION BY GAYS

[THIRD Edition]

Boston Globe - Boston, Mass.
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Document Text

The four Roman Catholic bishops of Massachusetts plan to seek permission from the state to exclude gay couples as adoptive parents, according to two board members of the church's largest social service agency who were briefed on the plan.

The decision follows a three-month study of the theological and practical impact of having Catholic Charities of Boston, the Boston Archdiocese's social service arm, place children with gay couples, given the Vatican's teaching that describes such adoptions are "gravely immoral."

This decision to seek an exemption from state anti- discrimination rules pits the bishops against the 42-member board of Catholic Charities of Boston, which is made up of some of Boston's most prominent lay Catholics. The board voted unanimously in December in support of continuing to allow gay couples to adopt children.

In the past two decades, agency officials placed 13 children with same-sex couples, a tiny fraction of 720 adoptions completed by them during that time.

The outgoing chairman of the board, whose term expired earlier this month, expressed strong opposition to the bishops' plan, saying it would undercut the agency's longstanding mission to provide stable homes for as many needy children as possible.

"This is an unnecessary, unmitigated disaster for children, Catholic Charities, and the Archdiocese of Boston," said Peter Meade, who remains a board member.

If the bishops obtain an exemption, they could continue to handle adoptions while excluding gay or lesbian applicants from consideration. However, if they do not win an exemption, they either have to allow gay adoptions to continue or risk having their adoption license pulled and being barred from adoption work in the state altogether.

The bishops have hired a Boston law firm, Ropes & Gray, to explore possible legal and political strategies of opting out of gay adoptions, said the two Catholic Charities board members, who spoke on the condition of anonymity because they were told the plan was confidential. It is unclear if these lawyers will be the ones to initiate any legal or political efforts.

The bishops have not decided how to seek the exemption, the board members said. But the options include asking Governor Mitt Romney for an executive order, seeking court approval on grounds of First Amendment protections for religious groups, or seeking passage of a measure in the Legislature exempting them from the discrimination provision.

The two board members said the Rev. J. Bryan Hehir, president of Catholic Charities of Boston, briefed the board about the bishops' plans at a meeting last week.

John Tuerck, spokesman for Ropes & Gray, said the firm had no comment and does not identify its clients.

Edward Saunders Jr. executive director of the Massachusetts Catholic Conference, the public policy office for the bishops in the state said he cannot comment on the bishops' views on gay adoptions, other than to say the topic remains part of "ongoing serious consideration."

In a prepared statement yesterday, he said that while the bishops want to maintain the "good work" that Catholic Charities does in the area of adoption, they must also deal with "substantial first amendment issues that arise from any government regulations which force Catholic social service agencies to provide services that conflict with church doctrine."

The church's role in gay adoptions became public after a Globe article in late October quoted Catholic Charities officials in Boston acknowledging they had been allowing a small number of gay adoptions to occur since 1987, in compliance with the state's anti- discrimination policies.

In early November, the four bishops of dioceses in Worcester, Springfield, Fall River, and Boston began meeting and said they would come to a decision by the end of January about whether to continue gay adoptions.

The issue of gay adoptions strikes a sensitive chord among Catholic leaders. Catholic Charities was founded more than 100 years ago, and one of its core missions has been to find adoptive homes for needy and abandoned children.

Its officials are also aware that many gay and lesbian parents have filled a much-needed role in taking in foster children, but that such placements directly conflict with Vatican pronouncements against homosexuals raising children.

State authorities say adoption agencies cannot discriminate, however. Any agency in Massachusetts that handles adoptions must obtain a state license, which prohibits them from turning down prospective parents based on sexual orientation, religion, and race, among other factors, said Constantia Papanikolaou, general counsel for the Department of Early Education and Care, which licenses all adoption agencies. If an agency knowingly discriminates, it could be stripped of its license to broker all adoptions.

"You can't have a discrimination policy," Papanikolaou said. "It's a condition of their license."

She said her agency which issues licenses for adoption agencies and day-care facilities, among other duties does allow some exemptions to the nondiscrimination regulations. She said some day- care centers, for example, have been exempted from the regulation that every child at the center must have been vaccinated, if a child's family objects on religious grounds, as some Christian Scientist families do. She said she does not believe her department would allow an adoption agency to have a policy of discriminating against gay couples seeking to adopt.

Of the 720 adoptions handled by Catholic Charities of Boston since 1987, roughly 60 percent involve foster children with the DSS, and 40 percent are babies and children who come into the agency from individual families.

Of the approximately 430 foster children adopted through Catholic Charities during that time period, 13 were placed with same-sex couples, said Virginia Reynolds, a spokeswoman for the agency.

They were all children who had been abused or neglected and were considered hard to place because they are older or have special needs, Reynolds said.

DSS relies heavily on Catholic Charities to help it place foster children. In the last fiscal year, Catholic Charities agencies placed 28 foster children in adoptive homes, roughly one-third of all foster children who found homes through private adoption agencies, DSS statistics show.

Among the four dioceses in Massachusetts, only Catholic Charities of Boston appears to be involved in gay adoptions. An official with Catholic Charities in Worcester said last fall that the agency refers any gay or lesbian applicants to other adoption agencies, a practice that state officials said violates state laws and would be investigated. A spokesman with the Diocese of Fall River said its adoption program has not handled any such adoptions because it never had a gay applicant. The Diocese of Springfield does not offer adoption services.

A move to stop gay adoptions by Catholic Charities may also prove troubling for the philanthropic agencies that donate only to organizations meeting certain antidiscrimination rules. Catholic Charities in Boston collected nearly $7 million, roughly 20 percent of its total income in the last fiscal year, from corporations, foundations, and individual donors, said Reynolds.

SIDEBAR:2005 DSS ADOPTIONSPLEASE REFER TO MICROFILM FOR CHART DATA. Patricia Wen can be reached at wen@globe.com.

Abstract (Document Summary)

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SEVEN QUIT CHARITY OVER POLICY OF BISHOPS

[THIRD Edition]

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Seven members of the board of Catholic Charities of Boston, including prominent business and media leaders, announced their resignations yesterday, saying that the Massachusetts bishops' effort to prohibit gays from adopting children from Catholic social service agencies "threatens the very essence of our Christian mission."

Among those who quit was Peter Meade, executive vice president of Blue Cross Blue Shield of Massachusetts and chairman of the board until last month. Meade expressed concern that the bishops' position on gay adoptions will alienate Catholics in the state and reduce much-needed donations for the agency's charitable work.

We "cannot participate in an effort to pursue legal permission to discriminate against Massachusetts citizens who want to play their part in building strong families," the seven members said in a statement.

The resignations are the latest development in a high-profile collision between leaders of the state's largest religious group and a population that increasingly embraces gay rights.

The 42-member board unanimously voted in December in favor of continuing gay adoptions at Catholic Charities. Along with Meade, the members who resigned are Geri Denterlein, president of Denterlein Worldwide Public Affairs; Donna Gittens, chief execu tive officer of Causemedia; Paul LaCamera, general manager of The WBUR Group; Brian Leary, a former television reporter and partner at Gadsby Hannah; Colette Phillips; president of Colette Phillips Communications; and Micho Spring, chairman of Weber Shandwick New England.

Meade said he has already heard from some current contributors to Catholic Charities who say they will pull their donations because of the bishops' plan. Last year, the agency raised $7 million, roughly 20 percent of its income, from individual donors, foundations, and corporations.

The resignations were announced as Governor Mitt Romney met for nearly an hour yesterday to discuss the issue with Archbishop Sean P. O'Malley and the Rev. J. Bryan Hehir, president of Catholic Charities. The bishops have said they deserve an exemption from the state's antidiscrimination laws, which prohibit discrimination against gays, on religious freedom grounds. The Vatican has described gay adoptions as "gravely immoral."

On Tuesday, Romney signaled his openness to hearing the bishops' request and discussing the issue. Yesterday, in a statement after the meeting, Romney said that he wants Catholic Charities to be able to continue doing adoptions in a way that does not conflict with Catholic principles.

"I would like to see the Church continue to provide this service," Romney said. "I believe religious institutions should be able to carry out their mission of helping people without violating their faith."

However, in the statement, Romney repeated previous remarks that he cannot simply waive the state's antidiscrimination law through an executive order.

But he left open the possibility that he could support the church's efforts in another way. "Ultimately, legislation may need to be filed to provide an exemption based on religious principles," Romney's statement said. "I look forward to continuing our discussions with the church so that we can assist them in performing their charitable work in a way that does not violate their religious beliefs."

Later, in response to a reporter's question, a Romney spokesman declined to say whether the governor opposes gay adoptions.

"The governor has said many times that he believes the ideal setting for the raising of a child is a home with a mother and a father," said spokesman Eric Fehrnstrom.

Asked again for Romney's view on gay adoptions, Fehrnstrom responded: "I'm going to let the 'ideal' statement speak for itself."

O'Malley and Hehir left the meeting through a side exit, bypassing reporters. O'Malley issued a statement saying he appreciated the chance to meet with the governor and described the meeting as "a preliminary one."

"The Catholic agencies in the dioceses of Massachusetts wish to continue the work of adoption and seek an exemption in order to comply with Catholic teaching on marriage and the family," O'Malley's statement said.

The bishops have previously raised the possibility of seeking passage of legislation that would grant them an exemption, but state Representative Eugene L. O'Flaherty, House chairman of the joint committee on the judiciary, has said "there would not be an appetite to entertain that" on Beacon Hill.

That leaves a third option, a court challenge by the bishops on the grounds that the state anti discrimination policy violates their religious freedom. Before that can happen, say several legal specialists, the bishops would have to specifically file for an exemption with the state and, after being rejected, go to court to challenge the decision.

Any legal action by the bishops is likely to attract a counterattack from gay organizations, who view the bishops' plan as profoundly offensive, saying it sweepingly casts all gay people as unfit parents.

Gary Buseck, legal director of Gay & Lesbian Advocates & Defenders in Boston, said his organization, which led the legal fight for same-sex marriage, is watching the case very closely and would consider taking action to fight the bishops' plan.

Buseck said he still holds out hope that the bishops will change their minds and allow the status quo to continue.

Over the past 20 years, Catholic Charities of Boston placed 13 children with same-sex couples, a fraction of the 720 children they placed in adoptive homes during that time period. The 13 children were all foster children who were considered hard to place, either because they were older or because they had special needs.

Catholic Charities has been handling adoptions for more than 100 years and is one of state's leading adoption agencies. If the bishops fail to win an exemption, but insist on excluding gay couples from adopting, they risk losing their adoption license altogether.

The seven members of the Catholic Charities board who resigned said they pray that the bishops will reconsider.

Denterlein said she resigned with deep sadness, because she feels such loyalty to Catholic Charities, which also offers day-care services, immigration assistance, and homeless aid. But she said she could not go along with the bishops' view that gay adoptions are harmful to children. "We each had to wrestle with our own conscience on this issue," she said.

Meade said the bishops are sending an unfair message to the 13 gay couples who have already adopted through Catholic Charities. "Does this new policy suddenly render the love and care they have given their children worthless? Of course not," he said.

But Edward Saunders executive director of the Massachusetts Catholics Conference, which represents the bishops has said that church doctrine on the issue of gay adoptions is unequivocal. The document, written in 2003, states that allowing children to be adopted by same-sex couples "would actually mean doing violence to these children." It ends by saying that gay adoptions are "gravely immoral and in open contradiction to the principle . . . that the best interests of the child, as the weaker and more vulnerable party, are to be the paramount consideration in every case."

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The Boston Herald

March 2, 2006 Thursday
ALL EDITIONS

OP-ED;
Conscience wins out for this Catholic

BYLINE: By PETER MEADE

SECTION: EDITORIAL; Pg. 031

LENGTH: 365 words

The heart of the matter is this: At Catholic Charities we seek to place some of the neediest children in society in loving adoptive homes, and I cannot be part of compromising that mission in the name of discrimination.

All couples seeking to adopt through Catholic Charities - regardless of sexual orientation - go through a lengthy and rigorous screening process. There has not been a single instance that I am aware of involving any harm to any child we have placed with gay or lesbian couples. And yet, the bishops' discrimination policy will render this vigorous process meaningless, and instead judge parental fitness solely on the basis of sexual preference.

Consider the message this sends to the 13 gay couples who have already adopted children through Catholic Charities. Does this new policy suddenly render the love and care they have given their children worthless? Of course not. Rather, it exposes the arbitrary nature of the policy, and illustrates the very point that without gay adoption, those children who are now in loving homes might otherwise still be waiting.

The damaging fixation with this issue by some within the church not only serves as a distraction from Catholic Charities' real goals but also threatens its broader mission. I have already heard from current contributors that they will not continue to contribute if the organization pursues this policy of discrimination. This policy could cost the organization significant contributions, upon which it relies to provide the many other services people in our communities desperately need.

Though there are many practical reasons why this policy is harmful, I am resigning because I believe this policy is morally wrong. I believe what I have been taught in my Catholic upbringing - that God loves us all; that Jesus taught us to love one another. I believe an active policy of discrimination violates this idea and that if we are to truly love one another we must do so in a non-discriminatory way, and that our greatest act of love for these children is to place them in loving homes regardless of the sexual preference of the parents.

This was excerpted from Meade's letter of resignation from Catholic Charities.

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CATHOLIC CHARITIES STUNS STATE, ENDS ADOPTIONS

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DECISION ON ADOPTION

In a stunning turn of events, Archbishop Sean P. O'Malley and leaders of Catholic Charities of Boston announced yesterday that the agency will end its adoption work, deciding to abandon its founding mission, rather than comply with state law requiring that gays be allowed to adopt children.

The Rev. J. Bryan Hehir, president of Catholic Charities of Boston, and Jeffrey Kaneb, chairman of the board, said that after much reflection and analysis, they could not reconcile church teaching that placement of children in gay homes is "immoral" with Massachusetts law prohibiting discrimination against gays.

"This is a difficult and sad day for Catholic Charities," Hehir said. "We have been doing adoptions for more than 100 years."

Catholic Charities of Boston began in 1903 as an adoption agency primarily serving Catholic children left by parents who died or abandoned them.

Officials in government, social services, and gay-rights groups expressed disappointment about the decision. Catholic Charities is widely respected among adoption providers and has handled more adoptions of foster children than any other private agency in the state.

Harry Spence, the state's commis sioner of social services, said he was "deeply saddened" to hear of Catholic Charities' withdrawal.

Lee Swislow, executive director of Gay & Lesbian Advocates & Defenders, said the outcome was "very unfortunate."

Almost immediately after the announcement, Governor Mitt Romney, who was in Tennessee speaking to a Republican group, issued a statement saying he would file legislation to exempt religious organizations that provide adoption services from the state's antidiscrimination laws.

"I ask the Legislature to work with me on a bill that I will file to ensure that religious institutions are able to participate in the important work of adoption in a way that always respects and never forces them to compromise their firmly held beliefs," Romney said.

Lawmakers have said that Romney's bill has little chance of passage, and some Democrats derided it as a presidential election ploy by the governor.

State officials and other adoption agencies were still absorbing the news yesterday, but said they would work to fill the gap left by Catholic Charities. The agency was especially adept at finding homes for so-called "special needs" adoptions, which include children who are older or who have significant physical or emotional disabilities.

Catholic Charities will shut down its adoption operation June 30, Hehir said. Adoptions underway will be completed, he said.

Hehir said he hoped the decision will end the tumult surrounding the gay adoption issue. The controversy began in October when the Globe reported that Catholic Charities had been quietly processing a small number of gay adoptions, despite Vatican statements condemning the practice. Over the last decades, the Globe reported, approximately 13 children had been placed by Catholic Charities in gay households, a fraction of the 720 children placed by the agency during that period.

Agency officials said they had been permitting gay adoptions to comply with the state's anti discrimination laws. But after the story was published, the state's four bishops announced they would appoint a panel to examine whether the practice should continue. In December, the Catholic Charities board, which is dominated by lay people, voted unanimously to continue gay adoptions.

But, on Feb. 28, the four bishops announced a plan to seek an exemption from the antidiscrimination laws. Eight of the 42 board members quit in protest, saying the agency should welcome gays as adoptive parents.

That day, Hehir and O'Malley met with Romney in his State House office to make their case for an exemption, but Romney said he lacked the authority to do so. Hehir and O'Malley left the State House feeling that nothing could be done soon for their cause. The bishops had considered launching a court challenge, but Hehir said he and O'Malley realized it would cost "too much time and energy" without any certainty of victory.

"It became clear our options were narrow," Hehir said.

In recent weeks, Hehir said, he had become increasingly concerned that the struggle over gay adoption would detract from other important work done by Catholic Charities. Since its founding, the agency had branched out significantly, helping 200,000 people in about 130 programs, including food pantries, day-care services, immigration legal clinics, and substance abuse programs. Only $1.3 million, or less than 4 percent of total revenues, is dedicated to adoption work now, Hehir said.

Some board members said another concern was the potential impact on financing. The United Way of Massachusetts Bay, which provided $1.2 million to Catholic Charities last year and is the largest private funder of the agency, planned to review its funding if the agency discriminated against gays and lesbians in its adoption work.

By late last week, Hehir said, it became clear that the simplest approach would be to withdraw from adoption services altogether. He convened a meeting with the board yesterday morning, in which members voted unanimously to pull out. After that, Hehir said he visited two of the agency's offices in Boston and Lawrence to tell adoption staff that its services would be over by the end of the fiscal year. Currently, the agency has 15 full-time adoption workers who will need to find new jobs.

He said workers were tearful, but understood the anguishing decision that Hehir faced.

Board members of Catholic Charities said they were also deeply saddened by the news. Some members, however, expressed some relief that they no longer had to wrestle with the painful clash between gay rights and religious freedom. James Brett, a board member, said the withdrawal was approved "with a heavy heart," but it is preferable to a protracted battle over an exemption.

"This is a better resolution," he said. "It's more straightforward."

Despite the board's sentiment, the decision upset some Catholics yesterday. Some were angry at Catholic Charities for giving up the fight for an exemption on religious grounds. The bishops have said that a 2003 Vatican document says children are best raised by a mother and father and described gay adoptions as "gravely immoral."

"It's a defeat for religious freedom," said C.J. Doyle, executive director of the Catholic Action League, a conservative Catholic advocacy group. "Not only does the church and society suffer, but the church is allowing itself to be marginalized."

Meanwhile, Andrew Davidson, 35, who was adopted as a baby through Catholic Charities of Boston, said he felt betrayed that leaders of the agency would so quickly abandon their longstanding mission rather than accommodate a small number of gay adoptions.

"My first reaction is shame on them and disappointment," he said.

Davidson, a development officer at Harvard University and father of two, said it had been "a source of pride" to say he had been adopted as an infant through Catholic Charities of Boston. His birth mother had wanted to place him with an agency that would care about Catholic upbringing. He said the church has long told desperate pregnant women that the wrong choice is abortion, and the right decision is adoption. "And now they're getting out of the adoption business?" he said.

The decision by Catholic Charities of Boston does not affect the other dioceses in the state, agency officials said. The dioceses in Worcester and Fall River, which do a small number of adoptions, are reviewing the future of their adoption

programs. The diocese of Springfield does not handle adoptions.

The reverberations over the issue are beginning to be felt outside Massachusetts. On Thursday, archdiocesan officials in San Francisco said they will be reviewing their practice of allowing a small number of gay adoptions. They were told this week by their former archbishop, who is now a top Vatican official overseeing church doctrine, that such practices are banned under church doctrine.

Patricia Wen can be reached at wen@globe.com.

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